Supreme Court, U.S.
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In The
Supreme Court of the United States

RONALD CLEVELAND, doing business as Lone Star Videotronics; PHOENIX-MERCHANT INVESTMENTS INC., doing business as 49er Video; THE BIG PICTURE VIDEO INC.,

Petitioners,

v.

VIACOM INC.; PARAMOUNT HOME VIDEO INC.; BUENA VISTA HOME ENTERTAINMENT INC.; COLUMBIA TRI-STAR HOME VIDEO INC.; UNIVERSAL STUDIOS HOME VIDEO INC.; TWENTIETH CENTURY FOX HOME ENTERTAINMENT INC.; BLOCKBUSTER INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the proper effect of defendants' evidence of a "business justification" under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), to excuse conduct otherwise indicative of an antitrust conspiracy; specifically, does it conclusively establish the absence of a triable conspiracy issue, even when controverted?

2. When plaintiffs make a prima facie case of a price fixing conspiracy with evidence that defendants engaged in consciously parallel conduct against their individual self-interest, may defendants obtain a judgment as a matter of law merely by offering testimony of company executives of a legitimate business reason for their conduct when that testimony is disputed by direct evidence from third parties?

3. Where a disfavored buyer's proof of discriminatory pricing is uncontroverted and shows sellers did not make functionally equivalent pricing terms available as required by *F.T.C. v. Morton Salt*, 334 U.S. 37 (1948), may sellers nevertheless prevail on a motion for judgment as a matter of law on whether they violated Sections 2(a) and 2(f) of the Robinson-Patman Act by claiming the business justification that the disfavored and favored buyers did not purchase under comparable terms?

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case contains the names of all the parties to the proceedings in the Fifth Circuit Court of Appeals. Pursuant to Rule 29.6, petitioners state as follows: Neither corporate petitioner Phoenix-Merchant Investments Inc. nor corporate petitioner The Big Picture Video Inc. is the subsidiary of any parent corporation. Further, no publicly held company owns 10% or more of either corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ronald Cleveland, Phoenix-Merchant Investments Inc. and The Big Picture Video Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 25, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, filed by Smith, J., is reported at 73 Fed. Appx. 736 (5th Cir. (Tex) 2003). (App. 1) The order of the Fifth Circuit denying the petition for panel rehearing is unreported. (App. 44)

The memorandum order granting defendants' motions for judgment as a matter of law, order denying plaintiffs' request for injunctive relief, and final judgment of the United States District Court for the Western District of Texas (Prado, D. J.) have not been reported. (App. 11, 13, 19)

JURISDICTION

The final judgment of the District Court was entered on July 9, 2002. The judgment of the Court of Appeals sought to be reviewed was filed on August 25, 2003, and the order denying the timely Petition for Panel Rehearing was entered on September 22, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), prohibits a seller from discriminating in price between two buyers. Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f), prohibits a buyer from knowingly inducing or receiving a discriminatory price. Both are reproduced in the appendix. (App. 46)

STATEMENT

This is a price fixing case concerning whether defendants may defeat proof of conspiracy on summary disposition by proffering evidence of a legitimate business justification for their conduct in the form of self-serving statements by company executives which are contradicted by direct evidence from third parties. Twenty years ago, this Court announced a framework for assessing the evidence necessary for a plaintiff to withstand summary judgment in a vertical price fixing case in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the purpose of which was to ensure the proper enforcement of the antitrust laws without chilling legitimate business conduct. Two years later, in a horizontal price fixing context, the Court sought to clarify that analytical framework in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Court has been silent on the issue now for over ten years,[1] during which time courts of appeals have

[1] Cases in which this Court has discussed in other antitrust contexts, but not changed, the standard include: *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992) (tying arrangement) and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (price discrimination under Robinson-Patman Act). In *Brooke* the Court held that the standard applied to all forms of summary disposition in antitrust cases. *Id.* at 226, e.g., summary judgment and judgment as a matter of law.

affirmed a well recognized basis for proving antitrust conspiracy: proof that the defendants acted in a consciously parallel fashion contrary to the individual interest of each. In this case, the Fifth Circuit has effectively eliminated that avenue of proof by allowing defendants to defeat such cases as a matter of law simply by offering testimony of a legitimate business justification through their own witnesses, even when the plaintiff presents direct evidence through third parties that contradicts the defendants' self-serving testimony. The decision below thus severely restricts the type of evidence that may be used to prove antitrust conspiracy in a manner never contemplated in *Monsanto* and *Matsushita,* and creates a more restrictive legal standard to withstand summary disposition than this Court has ever allowed, thereby subverting the goals of the antitrust laws. It is also inconsistent with this Court's rule for evaluating evidence of business justifications in other antitrust contexts, where simply controverting such evidence creates "[f]actual questions . . . about the validity and sufficiency of each claimed justification, making summary judgment inappropriate." *Eastman Kodak Co. v. Image Technical Serv., Inc.,* 504 U.S. 451, 483 (1992). The same rule should apply in a Section 1 antitrust conspiracy context.

The Fifth Circuit also adopted a price discrimination approach that contravenes this Court's mandate in *F.T.C. v. Morton Salt*, 334 U.S. 37 (1948), that sellers make functionally equivalent pricing terms available to all wholesale customers, including chain retailers who buy directly from the seller and distributors who re-sell the product to independent retailers. The Fifth Circuit allowed sellers, at the summary disposition stage, to avoid Robinson-Patman liability by finding distributors did not purchase under the same terms and conditions as a large chain, even though the sellers had not made functionally equivalent pricing terms available to the distributors. The

holding eviscerates the very purpose of the Robinson-Patman Act.

I. Factual Background.

Petitioners (plaintiffs below) are independent home video retailers serving local, neighborhood markets. Respondents (defendants below, except Warner and MGM who settled) are the home video divisions of the major movie studios who control almost 90% of the home-video market, and the largest home video retailer, Blockbuster (a competitor of plaintiffs). (Ex. 69 at 1923; Ex. 453 at 13525)[2] The market is national; the studio defendants do not vary their video prices geographically. (32 RT 1508; 35 RT 2293-94, 2451-55; 37 RT 2993-95) The studio defendants sell videos directly to some large rental chains, including Blockbuster, and they also sell videos to distributors, who resell them to independent retailers, including plaintiffs. (35 RT 2520-21)

In early 1997, the acquisition terms for tapes sold by the studio defendants were the same for all purchasers at the wholesale level. There was a level playing field.[3] By 1997, as the board chairman of Viacom (Blockbuster's

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[2] Citations are to the volume and page of the Reporter's Transcript ("RT") in the record on appeal and the trial exhibits ("Ex."). The appendix hereto also includes a categorized index of some of the background evidence (App. 51).

[3] Clark (Universal) trial at 1089:18–1091:17; Johnson (Disney) trial at 1511:13–1512:8; Kornblau (Universal) trial at 790;19–791:10; Maguire (Disney) trial at 1776:25–1777:4; Russell (Columbia) trial at 2095:11–2096:12; Wyatt (Fox) trial at 2521:6–2523:6; Doctorow (Paramount) dep. at 27:8–28:12). (29 RT 305-06; 30 RT 789-91; 31 RT 1090; 32 RT 1511-12; 33 RT 1775-76; 34 RT 2095-96; 35 RT 2522-23)

parent) admitted, the independent retailers were out-competing Blockbuster on this level playing field. (29 RT 294-95, 454; 33 RT 1781; 35 RT 2464) Independents generally had lower rental prices to consumers and better customer service (37 RT 3074-77), and Blockbuster was losing market share to them. (29 RT 295, 361-62; 32 RT 1515-17; 33 RT 1781-02; 35 RT 2541; 37 RT 3084) Blockbuster "was failing" and "running out of money," so it halted opening new stores. (29 RT 293-96) In the words of Sumner Redstone, Viacom's chairman, Blockbuster "had tanked," causing Viacom's stock to plummet "taking Viacom and me personally down the tubes with it." (Ex. 1 at 38-39, 282-83, 286; 29 RT 293-99)

In late 1997 and 1998, after Viacom's chairman met personally with the heads of the major studios, Blockbuster entered into "output revenue sharing" agreements with the studio defendants. The studios did not make output revenue sharing on the terms it had with Blockbuster available to the distributors from whom independent retailers purchase their tapes. (App. 51-53) The studios knew that Blockbuster's deals would allow Blockbuster to out-compete anyone lacking access to those terms, and that without the same or functionally equivalent deals the independent retailers' combined 55% market share was ripe for the taking. (29 RT 358, 387-90; 32 RT 1525) Blockbuster, by far the studios' largest buyer and video retailer (Ex. 74 at 13082; 29 RT 293, 358), implemented its plan by threatening to reduce (and actually reducing) purchases if a studio refused to provide favored pricing, and by providing the studios increased profits and a supracompetitive price.[4] (App. 61-65)

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[4] Admissions by one of the parties (Fox), as well as internal studio memoranda, indicated – both directly and by inference – that Blockbuster demanded that the studios not provide independent retailers

(Continued on following page)

Blockbuster's plan worked, immediately reversing its declining market share and increasing it from 24% in 1997 to 38% in 2001. (29 RT 358-60, 366; 31 RT 1071; Ex. 74 at 13082) That 14 percentage point increase is worth $1,200,000,000 per year to Blockbuster. (Ex. 184 at 87; 29 RT 356; 35 RT 2556) The vast majority of that gain came at the expense of independent retailers, thousands of whom have been driven out of business as a result. (Ex. 453 at 13531, 13541)

This dramatic reversal of fortune was not the result of normal competitive market forces. Blockbuster sought and obtained pricing terms for the purchase of videotapes that the studio defendants agreed not to make available to independent retailers. Plaintiffs allege that defendants conspired to fix the prices of videotapes of first run movies at the wholesale level by providing Blockbuster greater quantities of each movie at a substantially reduced price and not providing the same or functionally equivalent deal to the distributors from whom plaintiffs purchase. Therefore, plaintiffs asserted claims under Section 1 of the Sherman Act, Sections 2(a) and 2(f) of the Robinson-Patman Act, and parallel California statutes[5] (Op. at 739, App. 3), invoking federal question jurisdiction.

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access to Blockbuster's lower pricing and other favored terms. (App. 61-65) Pricing evidence showed that the studios failed to offer Blockbuster-comparable terms to distributors supplying the independent retailers, forcing the distributors to pay much higher wholesale prices than Blockbuster. (Ex. 598; App. 50)

[5] An action by other plaintiffs arising out of these same facts, but alleging claims only under California law, is pending in California state court, where they are also seeking a national class action. The trial court denied class certification, and has granted summary judgment to the defendants following the district court's grant of judgment as a matter of law here. *Lee Eddins d/b/a Video Empire, et al. v. Sumner Redstone, et al.*, Case No. BC 244270, Superior Court of the State of

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II. The Proceedings Below.

A. The Conspiracy Issue.

This conspiracy was motivated and orchestrated by Blockbuster to gain an advantage over independent retailers. Blockbuster needed favored acquisition terms in order to reverse the decline it was suffering with a level playing field. Blockbuster first obtained the agreement of the three studios comprising over 50% of the market to provide it favored treatment, knowing then that the others "had to play," then kept each advised as it obtained the agreement of the other studios. (Ex. 1 at 294; App. 65-67)

An agreement among sellers instigated by a buyer to disadvantage competitors of the buyer is a horizontal conspiracy in violation of the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000); *see Redwood Theaters, Inc. v. Festival Enterprises, Inc.*, 200 Cal. App.3d 687, 698-700 (1st Dist. 1988).[6] Such conduct is a horizontal conspiracy among sellers (here the studios) and the buyer (here Blockbuster), with Blockbuster "in the center as the ringmaster." *Toys "R" Us, supra* at 934. Each agreement between Blockbuster and a studio to disadvantage independent retailers is also a vertical conspiracy to restrain trade. *Interstate Circuit v. U.S.*, 306 U.S. 208, 220, 227, 232 (1939); *Toys "R" Us, supra* at 930, 936, 940; *Redwood Theaters, supra* at 703-13. Here, the agreements violating

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California for the County of Los Angeles. Both issues are currently on appeal in the California Court of Appeals, Second Appellate District.

[6] A horizontal conspiracy is an agreement that involves at least two competitors (here the studios). *Toys "R" Us, supra*, 221 F.3d at 934; *G.H.I.I. v. MTS, Inc.*, 147 Cal. App.3d 256, 257 (1st Dist. 1983). Having organized the horizontal conspiracy, Blockbuster is liable as a participant. *Toys "R" Us, supra*; *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999).

the Sherman Act are the (1) horizontal agreement among the studios and (2) vertical agreements between Blockbuster and each studio *not* to make the Blockbuster terms available to the distributors from whom plaintiffs purchase tapes.

It is a rare case in which a conspiracy can be shown by an explicit agreement. *Interstate Circuit v. U.S.*, 306 U.S. 208, 221 (1939). As a result, "most conspiracies are inferred from the behavior of the alleged conspirators . . . and from other circumstantial evidence (economic and otherwise)." *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 569 (11th Cir. 1998). The conspiracy "may be found in a course of dealings or other circumstances" – no formal or express agreement is necessary to constitute a conspiracy. *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946).

To survive a motion for summary judgment or judgment as a matter of law ("JMOL"), an antitrust plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. . . . " *Matsushita*, 475 U.S. at 588. Such evidence is required because legitimate competition could be chilled if inferences of an antitrust conspiracy were allowed based *solely* on "conduct as consistent with permissible competition as with illegal conspiracy. . . . " *Id.*; *accord*, *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 852 (2001).[7]

Evidence that tends to exclude the possibility of independent action is ordinarily found in the conduct of

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[7] In *Aguilar*, the California Supreme Court adopted this federal standard for proving conspiracy under the California Cartwright Act. Unlike federal law, the Cartwright Act allows indirect purchasers, such as plaintiffs, to sue for price fixing damages. Cal. Bus. & Prof. Code, § 16750(a); *Union Carbide Corp. v. Superior Court*, 36 Cal.3d 15, 19-20 (1984). Plaintiffs sued under both federal and California law.

the defendants, and that is the case here. Courts have consistently held that evidence of (1) consciously parallel action by defendants that is (2) contrary to the independent self-interests of each does tend to exclude the possibility of independent action and thus creates a jury issue on conspiracy. *Royal Drug, Inc. v. Group Life and Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984); *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 570 (11th Cir. 1998); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 527 (9th Cir. 1987).

In this case, plaintiffs' evidence showed: (1) each studio admitted that it was in its economic self-interest to agree to revenue sharing on Blockbuster terms with plaintiffs' distributors,[8] and yet each studio failed to do so,[9] (2) each studio admitted that it was not in its self-interest

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[8] Each studio admitted it was in its economic self-interest to make the Blockbuster terms available to all customers, because providing plaintiffs the same deals through distributors would have increased each studio's revenues and would have reduced Blockbuster's ability to gain market share. (App. 55-57)

[9] It is undisputed that only two respondents, Fox and Universal, ever offered output revenue sharing programs to plaintiffs' distributors and that those programs were not equivalent to the Blockbuster deal and were offered only *after* plaintiffs filed this lawsuit and *after* Blockbuster's output deal advantages had driven thousands of independents out of business. (App. 51-53, 78-79) The district court agreed: " . . . plaintiffs produced evidence that the studios did not provide video distributors with comparable revenue-sharing deals . . . ;" a finding the Fifth Circuit did not disturb. (App. 14) Ex. 598 is particularly compelling. (App. 50) It is a compilation of the actual purchase data for plaintiffs as compared to Blockbuster for the same tapes bought at the same time. It clearly shows the large disparity, and importantly is uncontested – it was admitted into evidence with no objection and was never controverted. (35 RT 2290-91) In addition, Viacom's chairman admitted that each of the deals between Blockbuster and each studio were economically simple and "very similar." (29 RT 333-35)

to take steps that would knowingly increase Blockbuster's market power and drive independents out of business, yet each knowingly did so,[10] and (3) each studio admitted that it was aware of the other studios' pricing to Blockbuster and plaintiffs' distributors.[11] Such consciously parallel conduct against independent self-interest creates a jury issue on conspiracy.[12]

The studio defendants sought at trial to excuse their refusal to provide Blockbuster-comparable deals to distributors for plaintiffs by claiming distributors could not do or would not agree to such deals – evidence comprised entirely of the studio witnesses' self-serving testimony. (App. 67) But the plaintiffs specifically controverted this contention by *direct* evidence that distributors and independent retailers requested and could do Blockbuster-comparable output revenue sharing: the two largest distributors wanted and could do the same output revenue sharing deals, and beginning in 1998 they repeatedly asked for the same terms as Blockbuster on behalf of independent retailers, but never got them.[13] Plaintiffs also

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[10] *See, e.g.,* 29 RT 414, 511-12, 534; 31 RT 1142-43; 32 RT 1634; Ex. 43 at 3774; Ex. 19 at 1590; App. 56-57, 76-79.

[11] *See, e.g.,* 29 RT 531; 30 RT 846; 31 RT 1002; 32 RT 1610; 36 RT 2741-49, 2807-09; App. 59-61.

[12] On the issue of conduct against self-interest, the court of appeals ignored defendants' admissions and discussed only the unnecessary and cumulative expert opinion that the defendants acted against their economic self-interests; dismissing it as "speculative and self-serving" without discussion (Op. at 740-41, App. 8), without any party raising the issue on appeal, and in spite of the district court having expressly denied defendants' *Daubert* motions to exclude the plaintiffs' experts. (App. 18-19)

[13] Ingram Entertainment, the nation's largest distributor repeatedly requested Blockbuster output revenue sharing terms on behalf of the independent retailers. (33 RT 1966-72; 30 RT 875, 887-88) In December 1998, Ingram wrote to each studio that the output revenue

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offered evidence that (1) independent retailers asked the studios to make the Blockbuster terms available to them, (2) studio documents and other evidence showed output revenue sharing could be offered through distributors and independent retailers could do output deals, and (3) all three plaintiffs testified that they wanted, and could do, output revenue sharing. (App. 67-70, 73-74)

It is undisputed that the conduct at the heart of this case occurred. The record is clear that the defendants engaged in consciously parallel pricing activities in providing favored deals to Blockbuster. Indeed, the district court found after more than two weeks of trial that "the studios did not provide video distributors with comparable revenue-sharing deals," a finding of fact the court of appeals did not disturb. (App. 14) Each studio admitted it was in its economic self-interest to provide plaintiffs with the same deals they provided to Blockbuster; testifying that such deals would have been in their interest, that they

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sharing given Blockbuster had created an unfair advantage because "[o]utput deals had not been available to all retailers" . . . and that the disparity had allowed the large chains "to grab market share by literally suffocating" the independent retailers. (31 RT 1098-1101; 32 RT 1568-69; 33 RT 1797-99, 1984-88; 34 RT 2016; 35 RT 2580; 36 RT 2791, 2828-32) In November 2000, Ingram told the studios that the devastation of independent retailers predicted in its December 1998 letter had come true, that the lack of competitive pricing persisted, and that "something is wrong here." (34 RT 2026-30, 2045; 36 RT 2796-97) Ingram's 2001 Strategic Plan promised to "continue to request [that the] studios level the playing field" for independents by making output deals available. (34 RT 2051-52) Another of plaintiffs' distributors, Rentrak, likewise requested output revenue sharing and advised that it "expect[ed] a majority of our retail customers" to shift to output terms if the studios would make them available. (Ex. 4039 at 985; Ex. 4058 at 2648; Ex. 4081 at 3525; 36 RT 2629-31) Yet no studio defendant agreed to Rentrak's request until *after* this lawsuit was filed, and even then the terms were materially worse than Blockbuster's. (30 RT 868-72; 35 RT 2573-74; 36 RT 2642-53)

attempted to do such deals with distributors for independent retailers, but the distributors could not or would not agree. (App. 55-57, 67) In short, each studio's explanation for why it did not do what it acknowledges would have been in its interest was that the distributors refused their alleged offer. But direct evidence introduced by plaintiffs from the two largest distributors, who were not parties to this case, showed the opposite: those distributors actively sought the same terms made available to Blockbuster but the studios would not agree.

Thus, plaintiffs directly contradicted the studios' purported justification for conduct that was admittedly against their interest – failure to agree to the Blockbuster terms with distributors. This should have created a fact issue for the jury. But the Fifth Circuit interpreted *Monsanto* and *Matsushita* as requiring it to give dispositive weight to the defendants' self-serving testimony of their purported business justifications.

1. The District Court's Decision. The district court applied the correct standard of proof when it denied defendants' joint motions for summary judgment. Citing specific examples, it found that plaintiffs "*have* presented evidence that *tends to exclude* the possibility that the studios acted independently." (App. 25, emphasis added.)[14] One would have expected defendants' JMOL motions to

[14] Those examples included: (1) Ingram's complaints to the studios; (2) evidence that while the studios claimed they offered independent retailers comparable deals, others "did not consider those deals as comparable"; (3) "the studios' expert admitted that acting in a way that creates significant market power in a single customer is a classic indicator of conspiracy"; and (4) evidence that "the studios acted against their self-interests," including testimony that it was not in a studio's "best interest to have Blockbuster gain a disproportionate amount of market share." (App. 25) See also App. 19-22.

suffer the same fate since the same standard governs both motions. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

But the district court reversed course 180 degrees by applying an erroneous standard. Instead of assessing whether the evidence *tended to exclude* the possibility of independent action – as it did in denying summary judgment – the court held that "no evidence *excluded* the possibility that the defendants acted independently in their quest to maximize their own profits" and "[a]s a result, the plaintiffs did not prove their conspiracy related claims. . . ." (App. 14, emphasis added.)[15] Thus, the district court improperly required plaintiffs to disprove defendants' proffered business justifications for their conduct – a standard far higher than the requirement to present evidence "that tends to exclude" independent action. *Matsushita*, 475 U.S. at 588.

2. The Court of Appeals' Decision. The court of appeals believed *Monsanto* and *Matsushita* required it to give dispositive weight to the self-serving testimony of the defendants' witnesses as to the reason for their conduct. In so doing, it created a standard for summary disposition of antitrust cases where proof of conspiracy based on consciously parallel conduct against self-interest is defeated

[15] Although the court's reasoning is set forth in its injunctive-relief order, that order rested on the court's JMOL findings of insufficient evidence of conspiracy and causation. (App. 14-15) The court had to apply JMOL standards in denying injunctive relief because any triable issue on the antitrust claims would preclude dismissing the injunction claims: Where an antitrust plaintiff pursues a jury trial on claims for damages and injunctive relief, the damages claims must be tried first and the jury's antitrust findings control the injunctive-relief question. *Florists' Nationwide Telephone Delivery Network v. Florists, Inc.*, 371 F.2d 263, 271 (7th Cir. 1967); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 221 (5th Cir. 1984).

merely by defendants' proffering a purported business justification for the conduct against self-interest, with direct evidence controverting that justification afforded no weight.

Reviewing a JMOL *de novo,* it is assumed that the court was cognizant of the evidence from the distributors that they actively sought and would have agreed to Blockbuster terms but the studios would not provide such terms. *Reeves,* 530 U.S. at 151 ("the court should review the record as a whole"). Yet the court failed to discuss that evidence, and gave dispositive weight to defendants' proffered business excuses that the studios attempted to provide the same deals through the distributors but the distributors could not do them or would not agree. If, as the court of appeals ruled, plaintiffs' evidence from the distributors that directly contradicts the studios' self-serving business justification evidence does not create a fact issue, then as a matter of law whenever a defendant proffers any business reason for its conduct, such evidence – even if contested by direct evidence – trumps evidence showing consciously parallel conduct against interest. As a practical matter, this would eliminate the ability to prove conspiracy by evidence of consciously parallel conduct against interest, even though such conduct is universally recognized as compelling evidence of conspiracy. That result, which proceeds from a misinterpretation of *Monsanto* and *Matsushita*, will seriously undermine the effective enforcement of the antitrust laws.

The court of appeals also violated this Court's admonition on review of JMOL that the entire record must be reviewed as a whole and the court "must disregard all evidence favorable to the moving party that the jury is not required to believe," *Reeves,* 530 U.S. at 151, instead

interpreting *Monsanto* and *Matsushita* as requiring it to accept as dispositive defendants' disputed evidence of business justification.[16]

B. The Robinson-Patman Issue.

Plaintiffs assert (1) the studio defendants violated Section 2(a) of the Robinson-Patman Act by charging prices to Blockbuster that were lower than those charged to the distributors from whom plaintiffs purchase, and (2) Blockbuster violated Section 2(f) by knowingly inducing and receiving those discriminatory prices.

The studio defendants have for years sold tapes to Blockbuster at an average cost per tape in the low $20 range and sold the same tapes to plaintiffs' distributors at an average cost per tape in the $40 to $60 range. (Ex. 598; App. 50) The defendants were fully aware of the impact this would have: According to Fox, "The increased copy depth and lower cost to Blockbuster will place Blockbuster at a severe competitive advantage over other rental retailers." (Ex. 43 at 3774) And the defendants know that the lower cost to Blockbuster did in fact have that impact: According to Universal, most of the gains made by Blockbuster and other large chains "have happened at the expense of the smaller chains and independents who are unable to compete" (Ex. 260 at 1583), and "most small retailers still don't have reasonably priced access," . . . "the industry has seen a net loss of more than 5,000+ specialty stores in the last 2 years." (Ex. 453 at 13541, 13531) Even Blockbuster admitted to the significant competitive

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[16] The court did not discuss most of the "plus factor" evidence (App. 55-67), but isolated the weakest evidence and compartmentalized the discussion in violation of this Court's mandate to construe all evidence *collectively* in the light *most favorable to plaintiffs. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

advantage it had, projecting that it would increase its market share to 40% by 2001 at the independents' expense. (Ex. 74 at 13104-05)

This is precisely the conduct and result the Robinson-Patman Act was designed to prevent. As stated in the district court's order denying defendants' first motion for partial summary judgment in this case:

> The language of the Act seems clear enough – the statute prohibits discriminatory pricing. Likewise, congressional intent is equally clear – to protect the continued existence of small retailers and to prohibit all devices, direct or indirect, by which large buyers gain discriminatory preferences over smaller buyers.

Cleveland, et al. v. Viacom, et al., 166 F.Supp.2d 535, 538 (W.D. Tex. 2001), relying on *F.T.C. v. Fred Meyer*, 390 U.S. 341, 349-52 (1968). Although their internal documents show the defendants knew they were providing Blockbuster a "lower cost" that would and did place plaintiffs at a severe competitive disadvantage, they came up with a laundry list of reasons why $20 for Blockbuster and $40 to $60 for plaintiffs does not amount to price discrimination. This was an effort to find loopholes in the Act so as to reach a result that is contrary to the clear congressional intent. In the end, that effort must fail. As the district court determined: "This Court will not interpret the Act in a manner that runs counter to these goals." *Cleveland*, 166 F.Supp.2d at 538.

1. The District Court's Decision. The district court found that "plaintiffs produced evidence that the studios did not provide video distributors with comparable revenue-sharing deals," but improperly granted JMOL on the Robinson-Patman claim by finding no causation, concluding that "no evidence tied the decline in plaintiffs' businesses to discriminatory pricing." (App. 14) Again, the district court reversed its denial of summary judgment, in spite of having

before it the same evidence that it had earlier found raised a fact issue as to causation. (App. 15, 24-26) Importantly, the district court did not find applicable the "laundry list" of reasons raised by defendants why the disparity of price did not amount to price discrimination.

2. The Court of Appeals' Decision. In affirming JMOL on the Robinson-Patman claim, the court of appeals took a different tact, holding that the prices plaintiffs' distributors paid for videotapes and the prices Blockbuster paid "are not reasonably comparable" for price discrimination purposes, because Blockbuster had to purchase a studio's entire output under long-term contracts while distributors "could select tapes title-by-title after box office results were known." (Op. at 741, App. 9) This not only ignores the evidence that the distributors wanted the same deal as Blockbuster, but such a "business justification" is legally irrelevant in view of this Court's mandate that the Robinson-Patman Act requires that sellers make pricing terms *functionally available* to *every* wholesale customer. *F.T.C. v. Morton Salt,* 334 U.S. 37 (1948). Here, the court of appeals made no finding that the different deals the studios made available to plaintiffs were functionally equivalent to the Blockbuster deals, nor even discussed the issue. It wholly ignored the evidence that the plaintiffs' distributors *had no choice but to* select tapes on a title-by-title basis because the studios did not offer them the Blockbuster output deal or any functional equivalent. (App. 51-53, 74)

The district court recognized that whether the studios made the Blockbuster output deals functionally available to the plaintiffs was at least a disputed fact issue for the jury when it chose *not* to base JMOL and injunctive-relief rulings on the Robinson-Patman argument that the court of appeals adopted. (37 RT 3249; App. 11, 15) In fact, not only did the district court not adopt defendants' non-comparability argument at the JMOL stage, it rejected it

as "frivolous" at the summary judgment stage. (App. 27) Further, the district court recognized that functional availability was a triable issue, finding that "plaintiffs produced evidence that the studios did not provide video distributors with comparable revenue-sharing deals." (App. 14)

REASONS FOR GRANTING THE WRIT

This case presents the important and recurring question of the legal effect of defendants' disputed evidence of a legitimate business justification for conduct otherwise indicative of an antitrust conspiracy. The Fifth Circuit here has entered a decision that conflicts with other courts of appeals and that improperly heightens the evidentiary burdens on antitrust plaintiffs set forth in this Court's decisions. Additionally, this Court held in *Eastman Kodak* that controverted evidence of a valid business justification prohibits granting summary judgment in a Section 2 antitrust tying case, 504 U.S. at 483, and now should affirm that the same rule applies with equal force to a Section 1 antitrust conspiracy claim. This case is an appropriate vehicle to resolve this legal issue because (1) the defendants' purported explanation for why their conduct should not be viewed as against their individual interests is controverted by direct evidence from third parties, and therefore (2) the issue of the effect on summary disposition of a defendants' business justification for its conduct is directly posed.

Consciously parallel conduct against self-interest is sufficient evidence to prove antitrust conspiracy. (*See* citations, *supra*, at 9) The Fifth Circuit erred in ruling that a defendants' disputed evidence of business justification for its conduct conclusively rebuts such evidence, because the court (1) misconstrued the analytical framework set out in *Matsushita,* thereby creating a more restrictive standard for summary disposition of antitrust

cases which sharply diverges from the law in other circuits, and (2) ignored this Court's admonition in *Reeves* that in reviewing a JMOL "the court should review the record as a whole" and "must disregard all evidence favorable to the moving party," except that which comes from disinterested witnesses and is "uncontradicted and unimpeached." *Id.*, 530 U.S. at 151.

The Fifth Circuit's rejection of the Robinson-Patman claim on the basis that the studios' sales to Blockbuster and distributors are incomparable for price discrimination purposes ignored this Court's long-held rule that sellers must make pricing terms *functionally available* to *every* wholesale customer. *F.T.C. v. Morton Salt,* 334 U.S. 37 (1948). The result eviscerates the protections of the Robinson-Patman Act.

I. The Fifth Circuit's New Restrictive Summary Adjudication Standard Conflicts With Decisions Of This Court And Other Circuits.

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) this Court held in a 5-4 decision that:

> [A]ntitrust law limits the range of permissive inferences from *ambiguous evidence* in a § 1 case. Thus, in *Monsanto* . . . we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

Id. at 588 (emphasis added, internal citations omitted). Thus, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove" a conspiracy. *Monsanto,* 465 U.S. at 764. In *Matsushita* the

"ambiguous evidence" – the conduct of all defendants uniformly charging lower prices to all customers – remained ambiguous because the defendants "had no motive to engage in the alleged predatory pricing conspiracy" in light of the economics of predation, therefore the theory of conspiracy was not plausible. *Matsushita,* 475 U.S. at 588. Because "cutting prices in order to increase business often is the very essence of competition," it is dangerous to infer a conspiracy solely from such parallel pricing. *Id.* at 594. Hence summary judgment was proper where the plaintiff did not produce any additional evidence that "tends to exclude the possibility that the conspirators acted independently," often dubbed a "plus factor."

Monsanto involved a vertical price fixing case in which the question was whether the manufacturer's termination of a single distributor violated the antitrust laws by acting in response to price-cutting complaints raised by other distributors. This Court held that the conduct of termination, without more, did not tend to preclude the possibility that the manufacturer acted on its own in terminating the distributor. However, additional evidence showed that Monsanto on at least two occasions had threatened to reduce supplies to other price-cutting distributors, and in "an arguably more ambiguous example," discussed "Monsanto's efforts to 'get the marketplace in order.'" *Monsanto,* 465 U.S. at 765. Both forms of evidence were subject to strong counterattack – but only before a jury. Therefore, summary judgment against plaintiffs was reversed.

The basic question in any motion for judgment as a matter of law is whether the plaintiff has presented evidence sufficient to raise a genuine dispute over matters of fact. This is the same standard as is used for summary judgment. *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 150 (2000). *Reeves,* an employment discrimination case, made clear that in entertaining a JMOL "the

court should review all of the evidence in the record," but "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 150. Moreover, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe," i.e., consideration of evidence favoring the moving party is limited to that from "disinterested witnesses" which is "uncontradicted and unimpeached." *Id.* at 151.

Antitrust cases are no different. While plaintiffs must present evidence that "tends to exclude" the possibility that the defendants acted independently, *Matsushita* does not impose a special burden on plaintiffs in responding to summary judgment in antitrust cases. "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992). Thus, although plaintiffs in price fixing cases cannot rely *solely* on conduct as consistent with conspiracy as independent action (e.g., consciously parallel conduct), *Matsushita* requires only that they present some additional evidence that would allow a reasonable jury to find a conspiracy more likely than not.[17]

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[17] Thus, as Professor Areeda has cautioned, "it is important not to be misled by *Matsushita's* statement, which restated *Monsanto* that the plaintiff's evidence, if he is to prevail, must 'tend . . . to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all non-conspiratorial explanations for the defendants' conduct. Not only did it use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable factfinder to infer that the conspiratorial explanation is more likely than not." Areeda & Hovenkamp, Antitrust Law, ¶ 1405 at 241 (Supp. 2001).

Courts of appeals have held as a matter of law that a conspiracy may be reasonably inferred where evidence shows defendants' consciously parallel conduct was contrary to their independent self-interests. In most circuits which have addressed the issue in an antitrust conspiracy context, evidence of business justification or other innocent explanation is just another piece of evidence for the jury to consider. Thus, the Third Circuit, referring to this Court's decision in *Eastman Kodak,* has explained that "the focus is to remain on evidence proffered by the plaintiff," noting that "the *Matsushita* Court did not hold that an antitrust defendant is entitled to summary judgment merely by providing *an* economic theory to justify its behavior." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.,* 998 F.2d 1224, 1231 (3d Cir. 1993) (citations omitted). *See also, Re/Max Int'l., Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999) (Evidence of parallel conduct against interest "will consistently tend to exclude the likelihood of independent conduct."); *City of Tuscaloosa v. Harcros Chemicals, Inc.,* 158 F.3d 548, 571 (11th Cir. 1998) (Requiring only conscious parallelism plus action against self-interest to get to the jury: "The circumstantial evidence in the instant case – that is, the documentary evidence and the plaintiffs' experts' data and testimony – will thus be sufficient. . . . "). More recently, the Eleventh Circuit has again found this standard consistent with *Matsushita* in upholding a grant of summary judgment. *Williamson Oil Co., Inc. v. Phillip Morris USA,* 346 F.3d 1287 (11th Cir. 2003).

The Seventh Circuit has repeatedly explained that evidence of an "innocent interpretation" is merely evidence for the trier of fact to consider. For example, in *In re Brand Name Prescription Drug Antitrust Litigation*, 123 F.3d 599, 614 (7th Cir. 1997) (Posner, J.) the court stated:

> The defendants argue that each of these "smoking guns" is susceptible of an innocent interpretation. But the issue before us is not whether the

> wholesalers were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a jury issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable.

See also, JTC Petroleum Co. v. Piasa Motor Fuels, 190 F.3d 775, 779 (7th Cir. 1999) ("The evidence is contested by the defendants, but the resolution of the contest is for trial."). More recently in *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651 (7th Cir. 2002), Judge Posner cautioned against the assumption "that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment." *Id.* at 655 "Otherwise what need would there ever be for a trial?" *Id.*[18]

The Fifth Circuit, however, has now departed from these other circuits, as well as its earlier formulation in *Park v. El Paso Board of Realtors,* 764 F.2d 1053, 1060 n. 11 (5th Cir. 1985) ("It is up to the jury to determine which explanation of the parallel action to accept: the explanation in terms of conspiracy or in terms of independent business judgment."). The change began in *Viazis v. Amer. Ass'n of Orthodontists,* 314 F.3d 758 (5th Cir. 2002), where the court found its own supposition of a possible business justification

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[18] Professor Areeda has stated in explaining the summary judgment standard in antitrust cases: "Requiring plaintiffs to exclude the possibility of defendant's innocence would increase the burden of proof beyond the usual civil standard of 'a preponderance of the evidence' to beyond a reasonable doubt or even to 'certainty.'" II Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law, ¶ 322, at 70, n. 30 (Rev. Ed. 1995 and Supp. 1996).

sufficient to rebut evidence of conduct against self-interest: "[E]vidence that a manufacturer took certain actions does not tend to exclude the possibility of independent conduct if the actions were in the manufacturer's independent self-interest." *Id.* at 764. The proffered innocent explanation for the accused conduct was asserted *sua sponte* by the court, and therefore went unrebutted. *Id.* ("This argument fails, because GAC *could have determined* that the potential benefits from its marketing agreement with Viazis would be outweighed by the loss of business that would result from its continued association with him") (emphasis added).

In this case, the Fifth Circuit extended *Viazis* to create a standard that completely eliminates a plaintiff's ability to prove a price fixing conspiracy with evidence of consciously parallel conduct against self-interest, as long as defendants proffer a business excuse for their conduct, even where direct evidence controverts that excuse. Both *Monsanto* and *Matsushita* reaffirmed that plaintiffs can prove a conspiracy with circumstantial evidence. But here, the Fifth Circuit says the opposite if defendants proffer any business justification for conduct that indicates they acted against independent self-interest. As discussed above, ample evidence controverted defendants' purported explanation for failing to provide Blockbuster-comparable terms to distributors – that distributors and independents did not want or could not do output revenue sharing. Only a jury can decide that disputed issue of fact.

Though the Fifth Circuit paid lip-service to the universally accepted legal standard that consciously parallel conduct against independent self-interest creates a reasonable inference of conspiracy, it ruled such evidence of conspiracy was of no moment because "a company's decision *to take actions* that are in its own interest *cannot support* an inference of conspiracy." (Op. at 740 n. 7, App. 7) (emphasis added) The court accepted as dispositive defendants' evidence that distributors would not do output

revenue sharing on Blockbuster terms because independent retailers could not utilize such terms, holding that plaintiffs' evidence "ignores significant differences between independent retailers and large chains such as Blockbuster." (Op. at 741, App. 8) Thus, the court gave no weight to plaintiffs' evidence from the distributors that directly contradicts this conclusion, rendering the evidence of consciously parallel conduct against self-interest meaningless in antitrust cases. That new standard invades the province of the jury, departs from other circuits and from this Court's rulings in *Monsanto* and *Matsushita*.[19]

The depth of this conflict is well illustrated by *In re Brand Name Prescription Drug Antitrust Litigation,* 186 F.3d 781 (7th Cir. 1999), where the Seventh Circuit rejected the type of approach the Fifth Circuit followed here. The court held that plaintiffs

> did not, as the defendant manufacturers rather absurdly argue, have to exclude all possibility that the manufacturers' price discrimination was unilateral rather than collusive. That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude would leave a possibility that the defendant was innocent.

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[19] The court also misstated the law as to the type of conduct necessary to show concerted action by stating that "[t]here is almost no evidence whatsoever, circumstantial or otherwise, that the studios engaged in any direct communication. . . ." (Op. at 740, App. 6) That is not a prerequisite of a horizontal conspiracy. *Interstate Circuit,* 306 U.S. at 227.

Id. at 787. But that is exactly what the Fifth Circuit required here – that plaintiffs disprove with 100 percent certainty defendants' proffered business justification.

Finally, the Fifth Circuit analyzed the evidence in this case in the same way criticized by this Court in *Reeves v. Sanderson Plumbing Prod., Inc.* 530 U.S. 133 (2000). Just as in *Reeves,* the court of appeals cherry-picked the evidence it considered in order to reach its result – discussing only the plaintiffs' weakest evidence and wholly accepting defendants' evidence. For example, on the issue of whether defendants' parallel pricing conduct was against their self-interest, the court failed to address each studio's admission that it was in its interest to do the same deals with plaintiffs. Rather, the court focused only on plaintiffs' expert's testimony (Dr. Sweeney), and dismissed it as "conclusional," "speculative" and "self-serving." (Op. at 740-41, App. 8) Then, having ignored the studios' admissions that it was in their best interest to do the same deals with plaintiffs as with Blockbuster, the court wholly accepted the defendants' self-serving and controverted business justifications for not doing so.

Such analytical techniques are no more appropriate in an antitrust case than they were in *Reeves,* an employee age discrimination case where this Court held the plaintiff has the "opportunity to prove by a *preponderance of the evidence* that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination." *Id.* at 143 (emphasis added). The same should be true here in contesting defendants' alleged business justifications. On considering a JMOL, "the court should review all the evidence in the record," and "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves,* 530 U.S. at 150. Importantly here, the court "must disregard all evidence favorable to the moving party," except that from "disinterested witnesses" which is "uncontradicted and

unimpeached." *Id.* at 151. *Matsushita* is in accord with *Reeves*. The Fifth Circuit's decision here is not.

The Fifth Circuit's restrictive approach of allowing defendants' disputed evidence of business justification to trump uniformly accepted circumstantial evidence of conspiracy – evidence that defendants acted contrary to independent self-interest – contravenes the teachings of *Matsushita* and *Monsanto,* departs from other circuits, and directly violates this Court's standard for reviewing a judgment as a matter of law set out in *Reeves.* It also is inconsistent with this Court's holding in *Eastman Kodak* that disputed business justifications cannot support summary judgment in a Section 2 monopolization context, and the same should be true here.

Clearly, after the demonstration in this case of the power the Fifth Circuit intends to wield with *Viazis* to eliminate the use of circumstantial evidence in proving Section 1 antitrust claims, only the most careless of price fixing conspirators will be brought to justice – those that confess and those that write down their illegal agreements. Substantively, the decision makes it impossible to maintain private actions against price fixers without direct, "smoking gun" evidence. This Court's guidance is needed to ensure the fair and uniform application of summary disposition standards in horizontal and vertical price fixing cases.

II. The Court Of Appeals Violated The Holding of *Morton Salt.*

The Robinson-Patman Act requires that sellers make pricing terms functionally available to every wholesale customer. *F.T.C. v. Morton Salt,* 334 U.S. 37 (1948). In *Morton Salt,* a salt supplier offered case-lot discounts to large chains that resulted in lower wholesale prices compared to the chain's smaller competitors. *Id.* at 41-42. The supplier claimed there was no Robinson-Patman discrimination because the discounts were "available to all

on equal terms." *Id.* at 42. This Court disagreed, holding that "[t]heoretically, these discounts are equally available to all, but functionally they are not" because only the large chains could meet the volume requirements for the discounts. *Id.* The Court held that suppliers must make pricing discounts functionally available to all wholesale customers, because "[t]he legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Id.* at 43.

Here, the Fifth Circuit held the conduct *Morton Salt* defines to be a violation of the Robinson-Patman Act is instead a defense. The Fifth Circuit held there was no Robinson-Patman violation because the deals made available by the studios to distributors for independent retailers "are not reasonably comparable" to the deals they made with Blockbuster. But far from being a defense, *Morton Salt* holds the failure of a seller to offer functionally equivalent deals to all is a violation of Robinson-Patman.

The wisdom of *Morton Salt* is demonstrated by the facts of this case. As set forth above, before the discrimination that occurred here, the independent retailers were outcompeting Blockbuster, offering lower prices and better customer service than Blockbuster, a result that was undeniably good for consumers. The evidence shows that once the studios began discriminating by not offering deals to distributors for independents that were functionally equivalent to the Blockbuster deals, Blockbuster was able to eliminate thousands of the independents who had been outcompeting it with lower prices and better customer service. The Robinson-Patman Act, as interpreted by *Morton Salt,* is designed to prevent this very conduct and result.

The Fifth Circuit's ruling therefore flies in the face of *Morton Salt* because it ignores the requirement that studios make the Blockbuster terms functionally available

to plaintiffs. The Robinson-Patman Act is rendered nugatory if a seller can make a favorable pricing program available to large chain stores, refuse to make a functionally equivalent program available to small retailers, and then claim that the differences in the only alternatives afforded the small retailers precludes a claim. The Fifth Circuit's ruling contravenes this Court's holding in *Morton Salt* and eviscerates the Robinson-Patman Act's protections.

CONCLUSION

The ability to prove a price fixing conspiracy with circumstantial evidence, such as consciously parallel conduct against individual self-interest, is critical to the proper administration of the antitrust laws because few defendants will ever provide direct evidence. The Fifth Circuit here gives all cartels a pass under the guise of a "business justification" unless there are explicit and direct admissions of the illegal conduct, a ruling which conflicts with other circuits on a legal issue that has not been directly addressed by this Court in an antitrust conspiracy context. Thus, the opinion below creates confusion and risks under-enforcement against the most pernicious form of antitrust violation – price fixing.

The Fifth Circuit's price discrimination ruling eviscerates the Robinson-Patman Act's purpose of ensuring sellers do not succumb to a large chain retailer's immense bargaining power by granting favored terms designed to drive independent retailers out of business.

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

December 22, 2003

App. 1

In the

United States Court of Appeals
for the Fifth Circuit

No 02-50811

RONALD CLEVELAND, DOING BUSINESS AS LONE STAR VIDEOTRONICS; PHOENIX-MERCHANT INVESTMENTS INC., DOING BUSINESS AS 49ER VIDEO; THE BIG PICTURE VIDEO INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

VERSUS

VIACOM, INC., ET AL.,

Defendants,

VIACOM INC.; PARAMOUNT HOME VIDEO, INC.; BUENA VISTA HOME ENTERTAINMENT, INC.; COLUMBIA TRI-STAR HOME VIDEO, INC.; UNIVERSAL STUDIOS HOME VIDEO, INC.; TWENTIETH CENTURY FOX HOME ENTERTAINMENT, INC.; BLOCKBUSTER INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
No SA-99-CA-783-EP

(Filed August 25, 2003)

Before DAVIS, SMITH, and DUHÉ, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Plaintiffs, independent video retailers, sued Blockbuster Inc. ("Blockbuster"), its parent company Viacom Inc. ("Viacom"), and the home-video affiliates of the seven major Hollywood movie studios,[2] alleging price discrimination and antitrust violations. The claims turn largely on the studios' output revenue-sharing agreements with Blockbuster, whereby rental tapes are made available to Blockbuster for a low initial price in exchange for a portion of rental revenues and a long-term commitment to purchase all the movies released by each studio. At the close of the plaintiffs' case-in-chief, the defendants moved for judgment as a matter of law ("j.m.l."), which the district court granted. We affirm.

I.

Plaintiffs Ronald Cleveland, d/b/a Lone Star Videotronics, Phoenix-Merchant Investments Inc., d/b/a 49er Video, and The Big Picture Video Inc., are independent video retailers in competition with Blockbuster, a large national chain. The parties agree that by 1997, the home-video rental market was struggling. Under the pricing

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[2] Defendants Paramount Home Video, Inc.; Buena Vista Home Entertainment, Inc.; Time Warner Entertainment Company, L.P.; Columbia Tri-Star Home Video, Inc., Twentieth Century Fox Home Entertainment, Inc.; and Metro-Goldwyn-Mayer Home Entertainment, Inc. (collectively "studios" or "studio defendants").

models prevalent at that time, neither independent retailers, such as plaintiffs, nor large chains, such as Blockbuster, had sufficient copies of "new release" titles available ("copy depth") at the time customer demand was highest. The result was customers frustrated by their inability to rent the movies they most desired to see.

Until 1997, distributors serving independent retailers and large chains such as Blockbuster typically purchased tapes from the studios through traditional purchases for a set price or through "cherry pick" revenue sharing, neither of which options provided adequate copy depth. Beginning in late 1997, however, Blockbuster entered into long-term output revenue sharing contracts with the studios,[3] enabling Blockbuster significantly to increase its new release copy depth, improving its ability to provide customers with desired titles.

Plaintiffs sued Blockbuster, Viacom, and the studio defendants, alleging that Blockbuster conspired with the studios to deny independent retailers long-term output revenue-sharing agreements functionally equivalent to its own. On the basis of these allegations, plaintiffs asserted claims under § 1 of the Sherman Act, 15 U.S.C. § 1; the Robinson-Patman Act, 15 U.S.C. § 13; and parallel California statutes.

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[3] Under revenue sharing agreements, studios lease tapes to retailers for lower up-front payments in return for a percentage of their revenues. Under "cherry pick" revenue sharing agreements, retailers are permitted to choose the specific tapes it [sic] wanted to purchase on a title by title basis. "Output" revenue sharing agreements, by contrast, require the retailer to acquire all titles a studio releases, regardless of box office performance and local market considerations.

II.

We review a j.m.l. *de novo*. *Arguello v. Conoco, Inc.*, 330 F.3d 355, 357 (5th Cir. 2003). "A j.m.l. is appropriate only where 'there is no legally sufficient basis for a reasonable jury to find for [a] party.'"[4] To defeat a motion for j.m.l., the nonmovant must point to a conflict in substantial evidence. *Casarez v. Burlington N./Santa Fe Co.*, 193 F.3d 334, 336 (5th Cir. 1999). Substantial evidence is evidence "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Id.*

A.

Plaintiffs advance two theories of concerted action in violation of § 1. First, they allege a horizontal conspiracy among the studios that was orchestrated by Blockbuster. Specifically, they contend that, at Blockbuster's instigation, the studio defendants conspired with each other to exclude independents from enjoying pricing terms similar to those provided to Blockbuster. Second, plaintiffs argue that Blockbuster's separate agreements with the individual studio defendants constitute a series of vertical conspiracies to exclude independents from enjoying favored pricing arrangements.

Plaintiffs rely entirely on circumstantial evidence in support of their claims. In reviewing a j.m.l., we consider all evidence in the light most favorable to the nonmovant,

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[4] *Id.* (citing FED. R. CIV. P. 50(a)(1)).

Giles v. Gen. Elec. Co., 245 F.3d 474, 481 (5th Cir. 2001), and draw all inferences from the evidence in favor of the party opposed to the motion, *id.* In antitrust cases, however, "the range of permissible inferences is limited by particular principles of antitrust law." *Viazis v. Amer. Ass'n of Orthodontists,* 314 F.3d 758, 762 (5th Cir. 2002) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986)), *cert. denied,* 123 S. Ct. 2078 (2003). "Accordingly, evidence of conduct that is 'as consistent with permissible competition as with illegal conspiracy' cannot support an inference of conspiracy." *Id.* (citing *Matsushita,* 475 U.S. at 588).

Therefore, in the absence of direct evidence of conspiracy, a plaintiff must introduce circumstantial evidence that "tends to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 768 (1984); *Viazis,* 314 F.3d at 762. Attempting to satisfy this standard, plaintiffs introduced documentary evidence and testimony concerning defendants' parallel behavior. Neither, however, tended to exclude the possibility of independent conduct.

1.

First, plaintiffs rely on evidence demonstrating that Blockbuster planned to increase market share by "owning" the new release market. Plaintiffs also point to Blockbuster's 1998 Business Plan, which projected increasing its market share from 25% to 50%, a goal plaintiffs argue is unreasonable absent some sort of favorable pricing.

Whatever these items of evidence are intended to prove, they cannot support an inference of conspiracy. A company can set ambitious competitive goals for itself,

such as "owning" a portion of the market or significantly increasing its market share, without giving rise to a presumption that it intends to use illegal means to achieve those goals.

Plaintiffs also rely on the statement of a Fox vice-president that Blockbuster had requested a "special deal" and "did not want [that deal] to be given to independents." The Fox officer also stated, however, that during the meeting at which that statement was made, Fox had refused to enter into any exclusive deal with Blockbuster.[5]

It is on the basis of this circumstantial evidence that plaintiffs attempt to establish concerted action. There is almost no evidence whatsoever, circumstantial or otherwise, that the studios engaged in any direct communication during their respective negotiations with Blockbuster

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[5] Plaintiffs also reference various internal memoranda making somewhat similar points. A 1997 Fox memorandum described the Blockbuster proposal as creating a favored revenue share relationship. The mere use of the word "favored" to describe a proposed business relationship, however, does not strongly support an inference of conspiracy, especially where, as plaintiffs concede, other large chain retailers eventually arranged similar deals.

Plaintiffs also point to two Warner memos that evidenced concern over industry backlash to the Blockbuster proposal and the possibility that its terms "[c]ould spur government inquiry into video pricing practices." Fear of the possible implications of the deal do not support an inference of conspiracy to exclude the independents.

Finally, a Disney memo stated that the company hoped to extend the Blockbuster terms to other key retailers, but apparently not to independent retailers. That memo does not imply that the decision not to extend the terms to independents was influenced by Blockbuster or another studio. In fact, none of these memos even indirectly refers to an agreement between the studios or to an unlawful request by Blockbuster to exclude independents.

or that any studio agreed, at Blockbuster's request, not to make output revenue-sharing terms available to independents.

2.

Plaintiffs argue that in addition to the previously discussed circumstantial evidence, the studios' parallel conduct gives rise to an inference of conspiracy. The mere fact that defendants followed similar courses of action, however, does not support such an inference.

The complained-of conduct is not the studios' agreements with Blockbuster *per se,* but rather the alleged refusal of any of the studio defendants to deal with the independents on similar terms. That conduct constitutes an antitrust violation only if it is the result of an agreement[6] rather than of each studio's independent business judgment. Consequently, plaintiffs must present "significant probative evidence" that the studios' parallel conduct "was contrary to their economic self-interest so as not to amount to a good-faith business judgment." *Royal Drug Co. v. Group Life & Health Ins. Co.,* 737 F.2d 1433, 1437 (5th Cir. 1984).[7]

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[6] Because plaintiffs allege horizontal and vertical theories of conspiracy, the unlawful agreement could be either among the studios generally or between each individual studio and Blockbuster.

[7] This is true regardless of whether Blockbuster wrongfully requested preferential treatment because, even in the face of such requests, a company's decision to take actions that are in its own interest cannot support an inference of conspiracy. *See Viazis,* 314 F.3d at 764; *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc.,* 988 F.2d

(Continued on following page)

Plaintiffs support their contention that defendants' conduct was contrary to their economic self-interest with conclusional testimony from their expert witness. That testimony is based in part on the simplistic assumption that because the studio's [sic] received greater revenues under the terms of their deals with Blockbuster, they likewise would have received greater revenues under similar deals with distributors serving independents. This approach ignores significant differences between independent retailers and large chains such as Blockbuster. Such speculative and self-serving expert testimony is an insufficient basis for plaintiffs' claims of concerted action.[8]

B.

To establish price discrimination, plaintiffs rely on the disparity between the prices plaintiffs' distributors paid for tapes and the amounts paid by Blockbuster. The Robinson-Patman Act and the California Unfair Trade Practices Act, however, prohibit price discrimination only

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587, 594 (5th Cir. 1993); *Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 579-81 (8th Cir. 1993).

[8] *See 7-Up Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)*, 191 F.3d 1090, 1106 n.9 (9th Cir. 1999); *Aviation Specialties, Inc. v. United Techs. Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978) (plaintiff's assertion that defendant's conduct was contrary to its economic interests held insufficient); *id.* at 1192 n.10 (profitable relationships with distributors insufficient to show that defendant acted against its interests in not adding plaintiff as distributor); *Cf. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law . . . , it cannot support a jury's verdict.").

where customers are otherwise purchasing on like terms and conditions.[9]

As defendants point out, the transactions at issue here are not reasonably comparable. Most significantly, distributors servicing independents such as plaintiffs could select tapes title-by-title after box office results were known, while Blockbuster was committed to purchasing a studio's entire output. Moreover, Blockbuster, unlike the distributors, undertook long-term obligations under its agreement with the studios. As a result of the significant differences among between [sic] the terms of the agreements, any disparities in amounts paid cannot support a claim for price discrimination.[10]

III.

Plaintiffs appeal the denial of their request for injunctive relief under 15 U.S.C. § 26, which authorizes district courts to provide relief "against threatened loss or damage by a violation of the antitrust laws." We review a denial of injunctive relief for abuse of discretion. *Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995). Consequently, we uphold a denial of injunctive relief unless the district court has relied on clearly erroneous factual findings or erroneous conclusions

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[9] *FTC v. Borden Co.*, 383 U.S. 637, 643 (1966).

[10] *Cf. Coastal Fuels, Inc. v. Caribbean*, 990 F.2d 25, 27 (1st Cir. 1993) ("[The Robinson-Patman Act does not] prohibit price differences between spot sales and long-term contract sales that reflect different market conditions.").

of law. *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916-17 (5th Cir. 1996).

Plaintiffs argue that they are entitled to such relief even if their substantive claims are rejected, because the relevant statutes do not require actual injury, but merely threatened harm. The threatened harm, though, must be a result of "a *violation* of the antitrust laws." 15 U.S.C. § 26.[11] Because plaintiffs have lost on the issue of whether a violation occurred, they are not entitled to injunctive relief.

AFFIRMED.

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[11] Plaintiffs also requested injunctive relief under parallel California statutes. *See* CAL. BUS. & PROF. CODE §§ 16750(a), 17078-80, 17203. Like their federal counterpart, these statutes authorize injunctive relief only against *violations* of the law.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RONALD CLEVELAND, d/b/a LONE STAR VIDEOTRONICS, et al.,	)	
Plaintiffs,	)	Civil Action No:
VS.	)	SA-99-CA-783-EP
VIACOM, INC., et al.,	)	
Defendants.	)	

ORDER GRANTING MOTIONS FOR JUDGMENT AS A MATTER OF LAW

(Filed Jul. 9, 2002)

On June 26, 2002, at the conclusion of the plaintiffs' case in chief, the defendants in the above numbered and styled cause moved for judgment as a matter of law. After considering the evidence in the light most favorable to the plaintiffs, the Court concludes there is no legally sufficient evidence for a reasonable jury to find for the plaintiffs on all claims and there is simply no evidence that presents a sufficient conflict in substantial evidence to create a jury issue. In particular, there is insufficient evidence of conspiracy to support the plaintiffs' conspiracy-related claims, and insufficient evidence of causation to support the price-discrimination claims. As a result, the Court GRANTS the defendants' motions for judgment as a matter of law (to include docket entries #'s 565, 566, & 567). The Court DENIES all pending motions as moot (docket entry #'s 477-2, 511, 562 & 564). Accordingly, the Court will enter an appropriate judgment.

SIGNED this 27th day of June, 2002.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RONALD CLEVELAND, d/b/a LONE STAR VIDEOTRONICS, et al.,	)	
Plaintiffs,	)	
VS.	)	Civil Action No: SA-99-CA-783-EP
VIACOM, INC., et al.,	)	
Defendants.	)	

ORDER DENYING PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

(Filed Jul. 9, 2002)

On June 27, 2002, this Court granted the defendants' motions for judgment as a matter of law in the above numbered and styled cause. Although that decision disposed of the majority of the plaintiffs' claims, it did not dispose of the plaintiffs' request for injunctive relief. The Court enters this order to resolve that issue.

In addition to alleging violations of federal and California anti-trust laws, the plaintiffs also asked for injunctive relief under 15 U.S.C. § 26, section 16750(a) of the California Cartwright Act, sections 17078 to 17080 of the California Unfair Practices Act, and section 17203 of the California Unfair Competition Statute. A district court can provide injunctive relief under 15 U.S.C. § 26 "against threatened loss or damage by a violation of the antitrust laws." Such relief necessarily requires the plaintiff to prove a violation of the antitrust laws. The California laws likewise permit the district court to issue an injunction

against a viclation. During the trial of this case, however, the plaintiffs did not prove a violation of the antitrust laws.

The plaintiffs alleged that the studio defendants conspired with each other, and with Blockbuster, to refuse to provide video distributors with comparable revenue-sharing deals. The plaintiffs presented no direct evidence of conspiracy. Absent direct evidence, the plaintiffs were required to present evidence that is not merely consistent with conspiracy but that tends to exclude the possibility of independent action. Although the plaintiffs produced evidence that the studios did not provide video distributors with comparable revenue-sharing deals, no evidence indicated that the studios conspired with one another or with Blockbuster to exclude independent video retailers from Blockbuster-type deals. Instead, the evidence showed that independent video retailers like the plaintiffs could not participate in similar deals because of the output nature of the Blockbuster deals. Instead of a conspiracy, the evidence indicated that Blockbuster sought out deals with each studio defendant as part of an overall business plan to revitalize its profitability, and that the studio defendants independently negotiated deals with Blockbuster. While the evidence showed that each studio was generally aware of each other's efforts to enter into an agreement with Blockbuster, and generally aware of the terms of each other's deals, no evidence excluded the possibility that the defendants acted independently in their quests to maximize their own profits. As a result, the plaintiffs did not prove their conspiracy related claims, and thus, no basis exists for this Court to provide injunctive relief.

The plaintiffs also alleged that the studio defendants charged the plaintiffs discriminatory prices for videos. The plaintiffs, however, failed to demonstrate that the injury to their businesses resulted from the alleged discriminatory pricing. The evidence showed that the plaintiffs' businesses declined as Blockbuster's market share increased, but no evidence tied the decline in the plaintiffs' businesses to discriminatory pricing. Without evidence of causation, the plaintiffs failed to prove their price discrimination claims. Consequently, no basis exists for this Court to provide injunctive relief. As a result, the Court DENIES the plaintiffs' request for injunctive relief.

SIGNED this 9th day of July, 2002.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RONALD CLEVELAND, d/b/a LONE STAR VIDEOTRONICS, et al.,	)	
Plaintiffs,	)	Civil Action No:
VS.	)	SA-99-CA-783-EP
VIACOM, INC., et al.,	)	
Defendants.	)	

JUDGMENT

(Filed Jul. 9, 2002)

In accordance with this Court's order dated June 27, 2002 granting the defendants' motions for judgment as a mater [sic] of law, and with this Court's order of this date regarding the plaintiffs' request for injunctive relief, it is hereby ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of the defendants and against the plaintiffs. Costs of this proceeding shall be borne by the party that incurred them.

SIGNED this 9th day of July, 2002.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RONALD CLEVELAND, d/b/a LONE STAR VIDEOTRONICS, et al.,	)	
Plaintiffs,	)	Civil Action No: SA-99-CA-783-EP
VS.	)	
VIACOM, INC., et al.,	)	
Defendants.	)	

ORDER CONCERNING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

(Filed May 17, 2002)

Ten motions for summary judgment have been filed in the above numbered and styled cause. Responses, replies and sur-replies have been filed. Because much has already been written about this case, and because the allegations and standards are not seriously disputed, this order directly addresses the arguments for summary judgment without elaborating on the background or nature of the case.[1] This order, however, does not address the motions for partial summary judgment filed by the defendants, Metro-Goldwyn Mayer Home Entertainment (MGMHE) and Time Warner Entertainment Company (Warner), because a settlement appears likely between those defendants and the plaintiffs. Before the Court can address the

[1] This Court's docket also demands this approach in order for other cases pending before this Court to proceed.

remaining motions, however, the Court must resolve the defendants' motion to exclude the reports and testimonies of the plaintiffs' experts.

Defendants' Motion to Exclude the Reports and Testimonies of the Plaintiffs' Experts

On November 30, 2001, the defendants moved to exclude the reports and testimonies of the plaintiffs' experts, Jeffrey Leitzinger and James Sweeney. Therein, the defendants asserted that the opinions of Doctors Leitzinger and Sweeney are marred by unsupported assumptions, untested hypotheses, unjustified speculation, and unsound economics that render the opinions wholly unreliable. Based on this position, the defendants asked the Court to exclude testimony from these witnesses, and in the alternative, to conduct a *Daubert* hearing. But with all that has been filed on this issue, the Court does not need to conduct a hearing to reach a decision on the defendants' motion.

The plaintiffs responded to each of the defendants' criticisms of their experts. The Court has studied the reports, affidavits, and depositions excerpts by Doctors Leitzinger and Sweeney, and finds that the opinions and methodologies of these experts are not so flawed as to render them unreliable. Although the defendants challenge the witnesses on numerous grounds, the plaintiffs, as well as the witnesses themselves, have addressed those challenges with logical explanations. As a result, the Court finds that the expected testimony is based upon sufficient facts and data relevant to the case, that the opinions to be presented are the product of reliable methodology, and that the witnesses have applied their methodologies

reliably to the facts of the case. Although the experts' opinions are certainly subject to challenge, those challenges are more appropriately made through cross-examination and the presentation of contrary evidence during trial. Consequently, the Court DENIES the defendants' motion to exclude the testimonies of Doctors Leitzinger and Sweeney (docket entry #425).

The Studio Defendants' Motion for Summary Judgment on the Plaintiffs' Horizontal Conspiracy Claims

The studio defendants first seek summary judgment on the plaintiffs' claims under Section 1 of the Sherman Act and the Cartwright Act that the studio defendants engaged in a horizontal conspiracy to fix the wholesale price of videos and to deny the Independent Video Retailers (IVRs) access to [] special revenue-sharing deals between the studios and Blockbuster. The defendants' argument is simple enough – that the plaintiffs have no direct evidence, and insufficient circumstantial evidence, of a horizontal conspiracy.

In response to this motion, the plaintiffs presented documentary evidence suggesting the studios engaged in parallel action. *See Royal Drug Co. v. Group Life and Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984). The documentary evidence shows that each studio offered a revenue-sharing deal to distributors that was different from the deal it offered to Blockbuster and those deals could not be used by the IVRs profitably, causing the plaintiffs to pay the higher prices the studios offered as the only alternative. The plaintiffs' evidence also indicates the studio defendants acted contrary to their individual self-interests because the revenue-sharing agreements

created significant market power in a single customer – Blockbuster. *See Royal Drug*, 737 F.2d at 1437. Thus, the plaintiffs presented evidence of a horizontal conspiracy. The studio defendants, however, maintain that because the alleged conspiracy is economically irrational, the plaintiffs face a higher evidentiary burden than would otherwise be necessary. *See Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1985).

In *Matsushita Electric Industrial Company v. Zenith Radio Corporation*, the Supreme Court considered a claim brought by American television manufacturers that Japanese television manufacturers had illegally conspired to drive them out of the American market by fixing and maintaining artificially high prices for television sets sold by the Japanese manufacturers in Japan, and by fixing and maintaining low prices for the sets exported and sold in the United States. In considering whether the court of appeals applied the proper standard to the district court's decision to grant summary judgment in favor of the Japanese, the Court stated that "if the claim is one that simply makes no economic sense – [the plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita Elec. Industrial Co.*, 475 U.S. at 587. The difference in this case, however, is that the plaintiffs' claims make[ ] economic sense.

The studio defendants maintain that the plaintiffs' theory of a horizontal conspiracy is against their economic interest because it gives a single customer – Blockbuster – substantial control over an important channel for distributing their products. This theory is economically irrational only if the studios create a market advantage in Blockbuster without getting anything in return. The studios,

however, received a significant benefit from their revenue-sharing agreements with Blockbuster – the studios obtained a significant share of Blockbuster's revenues from video rentals. Thus, regardless of whether plus factors are required, the plaintiffs have met their burden because the plaintiffs' theory makes economic sense. Notably, the *Matsushita* Court found the "alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation [as] strong evidence that the conspiracy does not in fact exist." *Matsushita*, 475 at 592; *see id.* at 597 (noting the remoteness of the alleged goal of the conspiracy from its inception). While this Court is not willing to hold the [o]pposite to be true – that the apparent success of the conspiracy that the plaintiffs allege is strong evidence that a conspiracy does exist, the Court observes that it is not faced with the same situation as the *Matsushita* Court.

Clearly, the plaintiffs' case is built on circumstantial evidence and pieced together with expert opinion. While no direct evidence of a horizontal conspiracy exists, the district court's role is to determine whether the evidence is such that a reasonable jury could return a verdict for the plaintiffs with all reasonable inferences viewed in the light most favorable to the plaintiffs. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); FED. R. CIV. P. 56(e). The relevant inference here is whether the studios engaged in a conspiracy to fix prices of the videos at the expense of the IVRs. The plaintiffs have met their burden by proving a genuine issue of material fact exists about: (1) whether the studio defendants offered revenue-sharing agreements to the IVRs or the distributors that were equivalent to their agreements with Blockbuster, (2) whether the studios acted against their individual self-interests by entering into the agreements, and (3) whether

the studios conspired with each other to deny the IVRs revenue-sharing agreements or merely conceded to Blockbuster's demands. As a result, the defendants are not entitled to summary judgment on the plaintiffs' horizontal conspiracy claims. The Court DENIES the defendants' motion for summary judgment on the plaintiffs' horizontal conspiracy claims (docket entry #381).

The Studio Defendants' Motion for Summary Judgment on the Plaintiffs' Vertical Conspiracy Claims

In a separate motion, the studio defendants move for summary judgment on the plaintiffs' vertical conspiracy claims: (1) vertical restraints of trade under the Sherman Act and the Cartwright Act, (2) price discrimination under the Robinson-Patman Act, and (3) price discrimination under California law. The defendants' arguments for this motion are addressed below.

The parties do not dispute that the plaintiffs must demonstrate that the challenged conduct of the defendants resulted in an unreasonable restraint on competition in the relevant market to prevail on the plaintiffs' claims of vertical restraint under section 1 of the Sherman Act and California law. The defendants, however, maintain that plaintiffs must make this showing in the context of the plaintiffs' *local* retail markets. Because the plaintiffs' experts have not conducted a detailed analysis of each of the plaintiffs' local markets, the studio defendants argue that no evidence of harm to competition exists.

In making this argument, the defendants emphasize language in this Court's order denying the plaintiffs' motion for class certification. In that order, the Court

determined that the question of anti-trust injury was not susceptible to classwide proof, in part, because the question of anti-competitive effect would turn almost exclusively on an examination of thousands of local markets and individual business practices. The Court went on to state that proof of a deleterious effect on competition would require each plaintiff to demonstrate that its ability to compete was injured and that the injury stemmed from conduct prohibited by anti-trust law. From a class perspective, this concern is indeed problematic because the class representatives must present proof on behalf of all class members, a task not possible in this case. In the context of individual claims, however, the plaintiffs may rely on their own abilities to compete to show injuries stemming from the defendants' conduct. In responding to the summary judgment motion, , the plaintiffs have raised a genuine issue of material fact about whether their abilities to compete were injured and whether those injuries stemmed from conduct prohibited by antitrust law.

The plaintiffs maintain that they are not required to conduct a detailed local market analysis where the alleged restraint is anti-competitive on its face and no non-competitive justification has been advanced. Indeed, sufficient authority exists to support this position. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459-61 (1986); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978); *Toys "R" Us v. FTC*, 221 F.3d 928, 936-37 (7th Cir. 2000). The plaintiffs have alleged that Blockbuster conspired with the studio defendants to obtain exclusive revenue-sharing deals that were better than deals offered to the IVRs. The plaintiffs have presented documentary evidence that raises genuine issues of

material fact about whether this occurred: The plaintiffs have raised questions about whether the studios offered revenue-sharing deals to the IVRs and whether deals offered to IVRs were actually comparable to the deals offered to Blockbuster.

The anti-competitive consequences of the alleged vertical conspiracy are apparent. If the alleged conspiracy existed, the IVRs would lose their ability to compete because comparable agreements were not available to them and they would be forced to pay higher prices for new-release videos. The higher prices resulting from the unavailability of comparable deals would prevent the IVRs from expanding copy-depth to levels that would enable them to compete with Blockbuster stores. Thus, the IVRs would lose their abilities to compete. This result is anti-competitive. Moreover, the plaintiffs have raised issues of fact about whether they lost their abilities to compete as a result of Blockbuster's revenue-sharing agreements. As for non-competitive reasons justifying the agreements, the plaintiffs and the studio defendants agree that the agreements were pro-competitive because the agreements resulted in deeper copy-depth, enabling consumers to obtain whatever video they seek. As a result, the Court concludes that the summary judgment is not appropriate on the grounds that no evidence of harm to competition exists.

The studio defendants also maintain they are entitled to summary judgment on the plaintiffs' claims under section one of the Sherman Act and California anti-trust law because no evidence of a vertical conspiracy exists. Because the studios maintain that the alleged conspiracy is economically irrational, they argue that the plaintiffs must present evidence that tends to exclude the possibility

that they acted independently. Although the Court is not convinced that the alleged conspiracy is economically irrational, the Court observes that the plaintiffs have presented evidence that tends to exclude the possibility that the studios acted independently. In particular, the plaintiffs have shown that David Ingram of Ingram Entertainment complained to the studios about the unavailability of comparable revenue-sharing deals for IVRs and advised the studios that IVRs wanted revenue-sharing deals equivalent to Blockbuster's deals. Although the studios maintain they offered the IVRs equivalent deals, the plaintiffs have shown that others – Mars & Company, Blockbuster and the studios – did not consider those deals as comparable to the Blockbuster deals. Although he stated that he did not believe such conduct existed in this case, the studios' expert admitted that acting in a way that creates significant market power in a single customer is a classic indicator of conspiracy. Certainly, the plaintiff[s'] evidence suggests that significant market power is what Blockbuster sought. Whether the studios conspired in achieving that goal is a question of fact. As a result, the Court concludes that the summary judgment is not appropriate on the grounds that no evidence of a vertical conspiracy exists.

The studio defendants also maintain that they are entitled to summary judgment on the plaintiffs' Robinson-Patman claims because the plaintiffs cannot show an adverse effect on competition. The defendants argue that this showing requires proof that the alleged price differential harmed competition in the relevant local market. Competitive injury, however, may be inferred from evidence demonstrating injury to an individual competitor. *See Haug v. Rolls Royce Motor Cars*, 148 F.3d 136, 142 (2d

Cir. 1998); *Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 657 (9th Cir. 1997); *Coastal Fuels of P.R. v. Caribbean Petroleum*, 79 F.3d 182, 193 (1st Cir. 1996). Although the studios maintain that the plaintiffs have adduced absolutely no evidence of any anti-competitive impact in the plaintiffs' local markets, the plaintiffs have presented evidence of injury to their abilities to compete in their respective markets. While the plaintiffs may ultimately be unable to prove their injuries were caused by the defendants' conduct because of various other factors affecting their abilities to compete, they are only required to raise a genuine issue of material fact about competitive injury at this point. In particular, the plaintiffs' expert compared the plaintiffs' stores and nearby Blockbuster stores in three Designated Market Areas – Sacramento, San Antonio, and Syracuse – showed how the plaintiffs' stores experienced significant decreases in sales after Blockbuster's revenue-sharing agreements were implemented while the Blockbuster stores experienced significant increases in sales. The plaintiffs themselves testified in their depositions that they would have used revenue-sharing agreements like Blockbuster's agreements had they been available and that they could not compete without comparable agreements. In doing so, the plaintiffs demonstrated an adverse effect on competition. As a result, the studio defendants are not entitled to summary judgment on the plaintiffs' Robson-Patman claims on the grounds that the plaintiffs cannot show a severe adverse effect on competition.

The studio defendants also maintain they are entitled to summary judgment on the Robinson-Patman claims because the plaintiffs' spot sales of videotapes and sales under Blockbuster's revenue-sharing agreements do not

constitute reasonably contemporaneous sales. The defendants argue that there is no meaningful way to compare the prices the plaintiffs paid for spot sales and the prices Blockbuster paid under its revenue-sharing agreements, and that the contemporaneous requirement must be measured at the time the revenue-sharing agreements were made. The plaintiffs, however, maintain that this argument is frivolous and the Court is inclined to agree.

The plaintiffs rely on sales to distributors. Measuring contemporaneity at the time contracts are made makes sense if two buyers enter into comparable agreements. *See M.C. Mfg. Co. v. Tex. Foundries*, 517 F.2d 1059, 1066 n.13 (5th Cir. 1975). The plaintiffs, however, complain that the studios did not make comparable agreements available to them or the distributors. As a result, there is no second contract against which to measure contemporaneity. Thus, if the contemporaneous requirement could only be measured at the time Blockbuster's agreements were made, the plaintiffs would never be able to show a contemporaneous sale because the studios did not offer the plaintiffs the same or comparable agreements. This result would defeat the purpose of legislation enacted to protect the continued existence of small retailers and to prohibit devices by which large buyers gain discriminatory preferences over smaller buyers. Nevertheless, whether the contemporaneous requirement is measured at the time Blockbuster entered into its agreement or at the time the videos are released, the result is the same in this case because there is no second agreement. Ultimately, Blockbuster paid a particular price for a video title, and the summary judgment evidence indicates that price was always significantly lower than the prices paid by others. Under the circumstances of this case, the determination of whether

prices for new-release videos are comparable as contemporaneous is in itself a fact question. For these reasons, the studios are not entitled to summary judgment on these grounds.

The studios' final arguments insist that the plaintiffs are unable to prove that their injuries were caused by the studios' conduct and that the plaintiffs are unable to definitively prove their damages. Somewhat multifarious, these arguments challenge the reliability of the plaintiffs' experts and the way the experts explain why the plaintiffs were injured by the alleged conspiracy and how they computed the amount of the plaintiffs' damages. These arguments are essentially the same arguments as those set forth in the defendants['] motion to exclude the reports and testimonies of Leitzinger and Sweeney. Having determined that the opinions of the plaintiffs['] experts are not so flawed as to render them unreliable, the Court finds that the plaintiffs have raised genuine issues of material fact regarding causation and the amount of damages. While the Court opines that the plaintiffs may not be unable to convince a trier of fact through a preponderance of the evidence that their losses were caused by the studio defendants' actions rather than other factors, or that their estimated damages resulted from the studios' conduct, the plaintiffs do not bear that burden at this point. The studio defendants are not entitled to summary judgment on these grounds. Accordingly, the Court DENIES the studio defendants' motion for summary judgment on the plaintiffs' vertical conspiracy claims (docket entry #412).

Blockbuster's Motion for Summary Judgment

Blockbuster moves for summary judgment on the same grounds as the studio defendants. Like the studios, Blockbuster asserts that no evidence of conspiracy exists to support claims under the Sherman and Cartwright Acts. Blockbuster maintains that revenue-sharing agreements and Blockbuster's communications with the studios are as consistent with permissible competition as with an illegal conspiracy. Because it maintains the plaintiffs' theory is economically and logically irrational, Blockbuster contends the plaintiffs must present unusually persuasive evidence to survive summary judgment.

Regardless of whether the plaintiffs' theory is economically rational, the court finds that the plaintiffs have presented evidence to survive summary judgment – specifically, evidence that tends to exclude the possibility that the studio defendants acted independently. In addition to the evidence discussed in the Court's consideration of the studios' vertical-conspiracy motion, the plaintiffs rely on Michael Johnson's deposition testimony that a customer with a dominant market share can turn into an 800-pound gorilla, and David Bishop's testimony that it was not in MGMHE's best interest to have Blockbuster gain a disproportionate amount of market share. This evidence indicates the studios acted against their self-interests. Coupled with evidence that Blockbuster sought out revenue-sharing agreements, the evidence tends to exclude the possibility that the studios acted independently. As a result, the evidence precludes summary judgment on the plaintiffs' claims under the Sherman and Cartwright Acts.

Blockbuster also seeks summary judgment on the plaintiffs' claims under the Robinson-Patman Act. Blockbuster argues that these claims fail because the plaintiffs cannot present evidence that it knowingly induced and received prices that discriminated in its favor. The plaintiffs, however, presented evidence that Blockbuster insisted on obtaining revenue-sharing agreements on exclusive terms. In particular, Mick Blanken testified in his deposition that Pam Wyatt from Fox studios stated during a meeting that Fox would not participate in revenue-sharing agreements because Blockbuster wanted a deal that was not available to the IVRs. The substance of Ms. Wyatt's comments were memorialized in Cammie Sparks's notes. John Caesar, another meeting attendee, recorded the same understanding in a letter to his attorney. William Mechanic's deposition indicates that Blockbuster actually reduced its purchases of Fox videos to motivate Fox to offer an exclusive agreement. This evidence precludes summary judgment on the plaintiffs' Robinson-Patman claims.

Blockbuster also argues that it is entitled to summary judgment on the plaintiffs' California law claims. Blockbuster contends that the plaintiffs cannot prove their claim under the California Unfair Practices act because the studios did not deny the IVRs the same terms as offered to Blockbuster. But as discussed above, a genuine issue of material fact exists over the comparability of agreements offered to Blockbuster and agreements offered to others. As a result, summary judgment is not appropriate on the plaintiffs' California Unfair Practices Act claim.

Blockbuster further contends it is entitled to summary judgment on the plaintiffs' claim under section 17200 of the California Unfair Competition Statute. Section 17200

prohibits any unlawful business practice. Because summary judgment is not appropriate on the plaintiffs' claims under the Cartwright Act or the Unfair Practices Act, summary judgment is not appropriate on the plaintiffs' section 17200 claim. As a result, the Court DENIES Blockbuster's motion for summary judgment (docket entry #423).

VIACOM Defendants' Motion for Partial Summary Judgment

Defendant VIACOM owns 100% of the voting stock of Defendant Paramount, and up until August 1999, VIACOM owned 100% of the voting stock of Defendant Blockbuster. Since August 1999, VIACOM has owned 96% of the voting stock of Blockbuster. Because these defendants contend Blockbuster and Paramount have been corporate affiliates under the control of their parent, VIACOM, during the time periods relevant to this lawsuit, they argue that the plaintiffs cannot present evidence of a conspiracy for the purposes of section 1 of the Sherman Act or the Cartwright Act. This position was previously presented in a motion to dismiss the plaintiffs' conspiracy claims amongst the VIACOM defendants[2] and is the subject of a motion for reconsideration pending in this cause.

In *Copperweld Corporation v. Independence Tube Corporation*, the United States Supreme Court determined

[2] The Court previously dismissed the plaintiffs' claim under section 1 of the Sherman Act and the Cartwright Act based on conspiracy between VIACOM and Paramount.

that a parent and its wholly-owned subsidiary "are incapable of conspiring with each other for the purposes of § 1 of the Sherman Act." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 775, 777 (1984). During the time Blockbuster and Paramount discussed, tested and implemented their revenue-sharing agreement, VIACOM wholly-owned both corporations. As a wholly-owned subsidiary of VIACOM at the time the agreement was implemented, Blockbuster was incapable of conspiring with VIACOM. Because there is no logical difference between allegations of a conspiracy between a parent and a wholly-owned subsidiary, and wholly-owned subsidiaries of the same parent, Blockbuster and Paramount were incapable of conspiring to violate antitrust laws via their revenue-sharing agreement because these corporations were wholly-owned subsidiaries of VIACOM when the agreement was implemented. Because evidence of a conspiracy is required for a claim under section 1 [of] the Sherman Act and the Cartwright Act, summary judgment is appropriate on the plaintiffs' conspiracy claims under the Sherman and Cartwright Acts amongst the VIACOM defendants.

The VIACOM defendants also maintain they are entitled to summary judgment on the plaintiffs' Robinson-Patman Act claims for essentially the same reason – because Blockbuster and Paramount are sister subsidiaries of the same corporate parent. These defendants maintain that the Robinson-Patman Act does not apply to transfers between sister subsidiaries of the same corporate parent.

Previously, the Fifth Circuit determined that a transfer of a product from a parent corporation to its wholly-owned subsidiary is not a "sale" under the Robinson-Patman Act. *See Security Tire & Rubber Co. v. Gates Rubber Co.*,

598 F.2d 962, 967 (5th Cir.1979). This determination has been extended to include transfers between parents and partially-owned subsidiaries, *see Novatel Communications Inc. v. Cellular Telephone Supply, Inc.*, C85-2674A, 1986 WL 15507 (Dec. 23, 1986 N.D.Ga.), at *4, and to transfers between sister subsidiaries of the same corporate parent, *see Brown v. Hansen Publications Inc.*, 556 F.2d 969, 972 (9th Cir. 1977). In light of the Fifth Circuit's determination about transfers between a parent and a wholly-owned subsidiary, this Court concludes that Blockbuster and Paramount constitute the same enterprise for purposes of section 2(a) of the Robinson-Patman Act. As transactions between subsidiaries that constitute essentially the same enterprise, sales from Paramount to Blockbuster cannot be considered favored sales for the purposes of liability under section 2 of the Robinson-Patman Act between the VIACOM defendants. As a result, these defendants are entitled to summary judgment on the plaintiffs' price discrimination claims between VIACOM, Paramount and Blockbuster. The Court GRANTS the VIACOM defendants' motion for partial summary judgment (docket entry #392) and DENIES the motion for reconsideration (docket entry #294) as moot. Accordingly, the Court will enter judgment in favor of the VIACOM defendants on the plaintiffs' price discrimination claims.

Columbia Tristar Home Entertainment's Motion for Partial Summary Judgment

Columbia Tristar Home Entertainment (Columbia) also moved for summary judgment on the plaintiffs' claims under the Robinson-Patman Act – and by supplement, under the California Unfair Practices Act – by asserting the meeting-competition defense. Section 2(b) of the

Robinson-Patman Act permits a seller to rebut a prima-facie case of price discrimination by showing that his lower price to any purchaser was made in good faith to meet an equally low price of a competitor. 15 U.S.C. § 13(b). The meeting-competition defense requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. "The seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 439 (1983). Columbia's summary judgment evidence, however, does not establish a meeting-competition defense.

At most, Columbia's evidence establishes that it may have been the last of the studio defendants to engage in revenue-sharing with Blockbuster, that Columbia knew that other studio defendants were participating in revenue-sharing, and that the IVRs were complaining about revenue-sharing with Blockbuster. The evidence does not demonstrate, or even imply, that Columbia offered a lower price for videos to Blockbuster in a good-faith effort to meet the low prices available from other studio defendants, that it even knew what prices other studios had extended to Blockbuster, or that a need existed to meet those prices. Consequently, Columbia is not entitled to partial summary judgment. The Court DENIES Columbia's motion for partial summary judgment (docket entry # 391).

Buena Vista Home Entertainment's Motion for Partial Summary Judgment

Buena Vista Home Entertainment, Inc. (Buena Vista), moved for partial summary judgment on the plaintiffs' conspiracy claims under section 1 of the Sherman Act and the Cartwright Act. Buena Vista states that [it] was involved in revenue-sharing long before it entered into an agreement with Blockbuster. Buena Vista argues that the plaintiffs cannot present evidence of a conspiracy because it exercised separate and independent business judgment to design revenue-sharing programs, whether those programs were offered to the major distributors or the IVRs through distribution.

Buena Vista's summary judgment evidence indicates Buena Vista viewed revenue-sharing as a way to get more of its movies into the stores and to manage customer dissatisfaction that resulted when desired videos were unavailable. Nonetheless, the plaintiffs have presented a letter addressed to Michael Eisner that suggests the Blockbuster terms would not be available to the IVRs. The plaintiffs also presented evidence that indicates that although Buena Vista was the first studio defendant to sign a revenue-sharing agreement with Blockbuster, Blockbuster had arrangements with several studio defendants prior to the actual signing of the Blockbuster-Buena Vista agreement. When viewed with evidence that the Blockbuster agreements contained more favorable terms than deals available to distributors and IVRs, the evidence raises a genuine issue of material fact about what role the participation of the other studio defendants had on Buena Vista's willingness to enter into an agreement with Blockbuster: Was the agreement a natural continuation of Buena Vista's past efforts with revenue sharing or the

result of an agreement amongst the studios to offer exclusive terms to Blockbuster? Consequently, the court DENIES Buena Vista's motion for partial summary judgment (docket entry #387).

Universal Studios Home Video's Motion for Partial Summary Judgment

Like MGMHE, Universal Studios Home Video (Universal) moved for summary judgment on the plaintiffs' vertical conspiracy claims under the Sherman Act and the Cartwright Act based on market share. According[ ] to Universal, its share of the national market for newly-released videocassettes for home video rental was only 11% in 1997 and 4% for the first half of 1998.[3] Universal maintains that its market share is insufficient to permit a finding of liability under the Sherman Act and Cartwright Act.

"[T]he reason for looking at market power is to determine whether the combination or conspiracy, not each individual conspirator, has the power to hurt competition in the relevant market." *Spectators' Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001). Although Universal cites several authorities for the proposition that a market share of less than twenty-five percent is insufficient as a matter of law to show market power, this case involves an allegation that the defendants combined their respective market shares to hurt competition in the relevant market by denying

[3] Universal's summary judgment evidence indicates that Universal's share of the market for 1997 was 6%.

profitable revenue-sharing arrangements to buyers other than Blockbuster. Certainly, such a conspiracy has the power to hurt competition in the relevant market. Universal's market share is necessarily part of the alleged conspiracy. Even though an individual market share might be insufficient by itself, there is no need to engage in a comparison of individual market shares of the defendants in this case because the plaintiffs have presented evidence that their abilities to compete were hurt. Consequently, summary judgment on this ground is not appropriate.

Universal also moved for summary judgment on the plaintiffs' claims under the Robinson-Patman Act. Universal first argues that the plaintiffs cannot demonstrate a sale for the purposes of the Robinson-Patman Act because it does not sell videocassettes to Blockbuster. Instead of selling videocassettes, Universal maintains it *licenses* videos for rental and for sale to consumers. Notably, the plain language of Universal's agreement with Blockbuster suggests a license rather than a contract for sales of videos. In fact, the agreement goes so far as to even contain a statement that the license of a copy of a Universal picture shall not be deemed a sale or other transfer of ownership for the purposes of copyright law. Nonetheless, Universal also presented summary judgment evidence that raises a question of fact about whether its revenue-sharing agreement actually constitutes a license. Specifically, Universal presented Richard Longwell's declaration. That declaration was previously submitted when the plaintiffs sought class certification. In that declaration, Longwell described the Blockbuster agreement as "an output deal obligating Blockbuster to *lease* a certain number [of] videos of each title that Universal releases." Longwell continued to explain that the number of leased

titles was determined by "the number of units that Blockbuster historically bought of titles with similar box office revenues." This later statement suggests Universal may have written its agreement as a license to disguise actual sales. Together, the evidence raises a question about the nature [of] the transactions conducted under the Universal agreement: are the transactions sales, licenses, or leases? As a result, summary judgment is not appropriate on this ground.

Universal also asserts that it is entitled to summary judgment on the plaintiffs' Robinson-Patman claims because the dominant [nature] of the transaction under the agreement is the transfer of an intangible item rather than a commodity – specifically, the transfer of intellectual property. The Robinson-Patman Act speaks in terms of sales of commodities. The courts have construed "commodity" to mean tangible or physical items. Where the compared transactions combine sales of services and physical goods, whether the compared transactions constitute sales of a commodity depends upon the dominant nature of the transactions. Universal relies [on] the Fifth Circuit's determination that a contract for the sales of news information services supplied by a news service company did not constitute the sale of a "commodity" within contemplation of the Robinson-Patman Act. *See Tri-State Broadcasting Co. v. United Press Intern., Inc.*, 369 F.2d 268, 270 (5th Cir. 1966).

In [ ] making that determination, however, the Fifth Circuit observed that the essence of the applicable transaction contemplated the sale of a privilege to broadcast news information, and the incidental right to use written news reports. *See Tri-State Broadcasting*, 369 F.2d at 270. Notably, the court observed that the dominant purpose of

the transaction was not merely the purchase of tangible written news reports, but rather the valuable right and privilege of broadcasting to listeners news supplied by a reputable news information service. *Id.* The court found that the contract contemplated the sale of a service together with the privilege of vocally passing on the information supplied by that service to a radio audience, making the news items in their printed form "tangible incidents" of the contractual right to use the news services. *Id.*

In this case, however, a videocassette is not a tangible incident to a contractual right to rent the cassette. The videocassette is the very instrumentality that makes home viewing possible. That instrumentality is a tangible commodity. The consumer cannot view the copyrighted content without entering the store, selecting a cassette, transporting the cassette home, and placing the cassette in a VCR. A videocassette containing a new-release movie is no more an intangible than a CD, a book or a computer game. The Court rejects this argument.

Universal also maintains that the plaintiffs cannot prevail on their Robinson-Patman claims because the prices Universal offered to Blockbuster were functionally available to the plaintiffs through its deal with Rentrak. Although Universal has gone to great lengths to show how its Rentrak prices were often lower than its Blockbuster prices, a question exists about the comparability of [] Universal's Blockbuster deal and the Rentrak deal. In particular, the plaintiffs have presented deposition testimony by Warner Quinn that the Rentrak deal was worse than the Blockbuster deal and by William Avera that Blockbuster did not consider the Rentrak deal as a viable option. Moreover, the plaintiffs' deposition testimony

indicates that the terms of the Rentrak deal made the deal unprofitable despite what was presented as lower prices of videos. Summary judgment is not appropriate on this ground.

In its last argument, Universal argues that the plaintiffs' Robinson-Patman Act[4] claims fail because Universal's entry into a revenue-sharing agreement with Blockbuster was a lawful means of meeting competition. A defendant charged with violating the Act has the burden of rebutting a prima facie case of price discrimination by showing that its lower price was made in good faith to meet an equally low price of a competitor. Universal's summary judgment evidence, however, fails to rebut the plaintiffs' prima facie case. Universal's evidence indicates, that prior to entering into a revenue-sharing agreement with Blockbuster, it knew Blockbuster had an agreement with several other studio defendants. The evidence further demonstrates that Universal was concerned that its profitability would be adversely [a]ffected if it did not enter into a revenue-sharing deal with Blockbuster because Blockbuster would buy less of its product. The evidence, however, does not indicate that Universal offered its deal to Blockbuster to meet low prices offered by the other studio defendants. Instead, Gregg Schoenborn stated in his affidavit that he did not know the specific details [of] Blockbuster's deals with the other studios. Without details, it is difficult to imagine that Universal could meet the low price of its competitors. Consequently,

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[4] Universal also advances a similar argument as a ground for summary judgment on the plaintiffs' claim under section 17045 of the California Business and Professions Code.

Universal is not entitled to summary judgment based on the meeting-competition defense. The Court DENIES Universal's motion for partial summary judgment (docket entry #395).

Twentieth Century Fox Home Entertainment's Motion for Partial Summary Judgment

In a separate motion for partial summary judgment, Twentieth Century Fox Home Entertainment (Fox) moved for summary judgment on the plaintiffs' claims under the Robinson-Patman Act and section 17045 of the California Business and Professions Code. Although Fox advances several arguments about why it is entitled to summary judgment on these claims, the Court need only address one of the arguments – Fox's "meeting competition" defense. Fox argues that it is entitled to summary judgment because it entered into its revenue-sharing agreement with Blockbuster in good faith to meet its competitors' prices and terms.

The uncontroverted summary judgment evidence establishes that Fox was the last studio defendant to enter into an agreement with Blockbuster. At that time, Fox had received reports that Blockbuster had revenue-sharing agreements with the other six studio defendants. In addition, Blockbuster informed Fox that it was entering into revenue-sharing deals with Fox's competitors. The summary judgment evidence indicates that Fox obtained and verified information about those deals through reports of its competitors' revenue-sharing agreements in national publications and the entertainment industry trade press, and from information provided by Blockbuster. Fox analyzed the costs and benefits of entering in a revenue-sharing

agreement with Blockbuster and compared revenue-sharing with traditional buying. During this time, Blockbuster threatened to reduce its purchases of Fox titles if Fox did not enter into a revenue-sharing agreement with Blockbuster. When Fox failed to enter into an agreement, Blockbuster reduced its purchases of Fox titles. Ultimately, Fox determined that revenue-sharing with Blockbuster would result in increased revenue to Fox.

Fox's evidence establishes facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. Specifically, a reasonable person would believe that Fox determined that it must engage in revenue-sharing with Blockbuster in order to compete with the other studio defendants in distributing its new release movies. Without purchases by Blockbuster, Fox would be unable to compete with the other studio defendants. Thus, Fox has established the meeting-competition defense. 15 U.S.C. § 13(b). As such, Fox is entitled to summary judgment on the plaintiffs' claims under the Robinson-Patman Act and section 17045 of the California Business and Professions Code. The Court GRANTS Fox's motion for partial summary judgment (docket entry #422), and will enter judgment in favor of Fox on the plaintiffs' claims under the Robinson-Patman Act and section 17045 of the California Business and Professions Code.

Conclusion

With these motions resolved, this cause will proceed to trial on June 10, 2002. The Court will HOLD IN ABEYANCE the motions for partial summary judgment filed by MGMHE and Warner (docket entries #393 and #424

respectively) pending notice that the plaintiffs' disputes with these defendants have been settled.

SIGNED this 17th day of May, 2002.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50811

RONALD CLEVELAND, doing business as Lone Star Videotronics; PHOENIX-MERCHANT INVESTMENTS INC, doing business as 49er Video; THE BIG PICTURE VIDEO INC, on behalf of themselves and all others similarly situated

Plaintiffs-Appellants

v.

VIACOM INC, ET AL

Defendants

VIACOM INC; PARAMOUNT HOME VIDEO INC; BUENA VISTA HOME ENTERTAINMENT INC; COLUMBIA TRI-STAR HOME VIDEO INC; UNIVERSAL STUDIOS HOME VIDEO INC; TWENTIETH CENTURY FOX HOME ENTERTAINMENT INC; BLOCKBUSTER INC

Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON PETITION FOR REHEARING

(Filed Sep. 22, 2003)

Before DAVIS, SMITH, and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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15 U.S.C. § 13

§ 13. Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:

Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a

violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance of discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person,

unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

CONFIDENTIAL

Exhibit 18

Plaintiff Versus Blockbuster:
Weighted Average Price Comparisons by Studio

Studio	49er Video			Big Picture Video			Lonestar Videotronics		
	Plaintiff Wholesale	Blockbuster	Difference	Plaintiff Wholesale	Blockbuster	Difference	Plaintiff Wholesale	Blockbuster	Difference
					(Dollars)				
			(3)-(2)			(6)-(5)			(9)-(8)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Buena Vista	$ 50.12	$ 24.25	$ (25.86)	$ 44.21	$ 24.74	$ (19.47)	$ 63.45	$ 26.73	$ (36.72)
Columbia	48.12	19.40	(28.71)	42.16	20.22	(21.94)	58.18	20.86	(37.31)
Fox	45.17	23.71	(21.46)	42.26	24.32	(17.94)	60.23	23.86	(36.37)
MGM	38.29	20.67	(17.63)	37.12	20.56	(16.56)	40.12	21.43	(18.69)
Paramount	47.29	22.71	(24.57)	39.97	22.54	(17.43)	60.14	25.83	(34.31)
Universal	49.57	26.94	(22.63)	47.50	26.64	(20.86)	66.71	28.61	(38.11)
Warner	47.16	19.17	(27.99)	38.09	18.33	(19.77)	58.21	19.94	(38.27)
All Studios	$ 47.70	$ 22.44	$ (25.27)	$ 41.48	$ 22.31	$ (19.17)	$ 60.10	$ 23.90	$ (36.20)

Source: Col. (2), (5), (8): Studio Copy-Depth Programs, ETD Wholesale Cost of New Releases 1997 - Present ETD00001-00029,
49er Video Prebooking Records JM 000001-000051,
Big Picture Video Prebooking Records DS 026818-026882,
Lonestar Videotronics Invoices RC 006471-006710,
RC 006947-007117, RC 007608-008003, RC 00873-008128;
Col. (3), (6), (9): Plaintiff's Exhibit 87, WHV 200001-200008,
UN 03620-03651, MGM 006-004490 - 006-004539,
BLO 018487-020161, BLO 027927-028008,
PHV 18150-18171, PHV 18790-18806,
Fox 010978-010979.

TRIAL EXHIBIT NO.
P-598

Econ One

Index to Record Evidence

Because the record evidence in this case is voluminous, petitioners have prepared the following categorized index to selected items of evidence that they believe provide background in the record underlying this petition. This index is intended to assist the Court in locating underlying evidence by category if desired in ruling on this petition.

Part A. Selected Record Evidence Regarding Consciously Parallel Conduct Against Economic Self-Interest.

1. Evidence that the studio defendants did not offer output deals to distributors from whom plaintiffs purchased tapes, and that the only pricing programs the studio defendants offered distributors were worse than Blockbuster's, includes:

36 RT 2782-83, 2790-800; 36 RT 2799-802	Paramount never offered output deals to distributors and offered only the inferior cherry-pick revenue sharing after June 1999
30 RT 797-816; 31 RT 1060	Universal never offered distributors Blockbuster's output terms, and left in place as the only alternative the inferior distributor Rentrak cherry-pick deal in place during 1998-2000

30 RT 868-72; 31 RT 1029-39	Universal offered Rentrak output deal after this lawsuit was filed but with less favorable revenue share than under Blockbuster deal
32 RT 1552-59, 1570-77; 32 RT 1455-56; 33 RT 1747-50	Disney never offered distributors output or Blockbuster-comparable deals
42 RT 2130; 32 RT 1448-54; 34 RT 2111-24, 2140-41, 2154-64	Columbia never offered distributors output deals
36 RT 2839-57 & 37 RT 2923-26	Analysis of inferior May 1998 Warner-Ingram output deal
37 RT 2926-29	Analysis of inferior MGM-Rentrak output deal
35 RT 2523-24, 2573-74; 36 RT 2714; 36 RT 2642-52	Fox never offered distributors Blockbuster's output terms and left in place as the only alternative the inferior Rentrak cherry-pick deal in place from 1997 to March 2000
29 RT 557, 586-87; 30 RT 606-07, 680, 737	Discussion of deals available to plaintiff 49'er Video
31 RT 1205-29, 1256, 1279; 32 RT 1345, 1456, 1463, 1477-78, 1484-85	Same as to plaintiff Cleveland
33 RT 1808-09, 1827-28, 1854-55	Same as to plaintiff Big Picture

Ex. 453 at 13541	Universal: "[m]ost small retailers [in 2000] still don't have reasonably priced access"

2. Additionally, Ex. 598 (the first page of which is reproduced herein at App. 50) is a compilation of the actual purchase data for plaintiffs as compared to Blockbuster for the same tapes bought at the same time (showing pricing disparity).

3. Evidence regarding the nature, terms, and effects of the deals between Blockbuster and the studios includes:

29 RT 333-35	Testimony of Viacom chairman Sumner Redstone that deals between Blockbuster and each studio were economically simple and "very similar"
Ex. 1 at 291; Ex. 174 at 13843; 29 RT 335; 30 RT 808-09; 32 RT 1549-51; 37 RT 3101	The studios' share of the retailers' revenue was significantly less under Blockbuster's output deals than under cherry-pick deals
29 RT 384-85; 30 RT 833-34; 32 RT 1531-32, 1549; 33 RT 1790-92; 37 RT 2874-75, 2932-35	Reduction in the studios' ultimate share enabled Blockbuster to obtain profitable copy depth on all studio titles
29 RT 331, 437; 31 RT 989-94, 1053, 1122, 1129; 32 RT 1475; 33 RT 1707, 1737-39; 34 RT 2219-20, 2263; 36 RT 2839; 37 RT 2933-34	Each deal was designed to allow Blockbuster to obtain more copies than before, while spending the same amount of money it had previously spent with each studio

Ex. 260 at 1599; 30 RT 839-43; 31 RT 1057	Universal study showing Blockbuster's per-tape cost from Universal as $14-24 less than Universal, Fox, Paramount and Columbia's best prices to distributors
37 RT 3119-20	Blockbuster conclusion that its revenue-sharing deals reduced its average unit cost by 56%
Ex. 714 at 10	Blockbuster admission that tape rentals "not subject to revenue-sharing [are] typically released to video retailers at higher wholesale prices"
Ex. 710 at 14954	Blockbuster admission that paying the same prices as distributors would adversely affect its business
29 RT 312, 336-37; 37 RT 3212; Ex. 1 at 290-91	Viacom's chairman knew that studios' cherry-pick deal revenue split was "higher than the retailer could afford" and that profitable copy depth and breadth required a lower split
32 RT 1540	The studios knew a high studio revenue percentage precluded copy depth and breadth

29 RT 337	Viacom's chairman: Blockbuster "got the deal that works"

4. Evidence from studio defendants that denying independents the Blockbuster terms would be contrary to their individual self-interests included:

a. Admissions that studio defendants would have increased their revenues by providing independents through distributors the same output terms given Blockbuster:

36 RT 2635-41; Ex. 4039 at 985	Rentrak unsuccessfully sought Fox's consent to output revenue sharing program that "will generate approximately 70% more margin dollars" for Fox
31 RT 976	Universal's "goal is to maximize revenue," and therefore "it doesn't make any sense . . . from a business standpoint" to deny output revenue-sharing to any retailer
31 RT 1152	Universal wanted every distributor and retailer to have Blockbuster revenue sharing
31 RT 1155	It would be bad business for Universal "to deny Blockbuster revenue-sharing terms to anyone"

33 RT 1668	It was in Disney's interest for all customers to do output revenue sharing
34 RT 2222	Columbia would "have loved" independents to do output deals

b. Admissions that it was contrary to each studio defendant's individual self-interest to increase Blockbuster's market power:

29 RT 414	Viacom's chairman Redstone: "it was contrary to every studios' interest to sacrifice their other customers"
Ex. 43 at 3774	Fox: the "disproportionate market share" that Blockbuster will gain from copy depth and lower prices "will significantly reduce the studio's leverage on future transactions"
29 RT 511-12 & Ex. 19 at 1590	Warner: unless independents received the Blockbuster deal, Blockbuster would "grow marketshare" and then "exercise its marketshare to eliminate competition and negotiate improved terms with studios"

29 RT 534	Warner had "very strong views" about wanting "a nonconcentrated marketplace with no significant buyer"
31 RT 1142	"The more competitive the market is and the more customers in the market, the better position [Universal] would be in"
31 RT 1142-43 & 1175; Ex. 259 at 2001	It was in Universal's interest to "avoid fueling further consolidation"
32 RT 1634	It was against Disney's interest to put any customer out of business

Part B. Selected Record Evidence of Other "Plus" Factors

In addition to evidence regarding consciously parallel conduct against the defendants' independent economic self-interest, there was evidence regarding additional "plus" factors often used to prove concerted action, including:

1. Blockbuster's financial motive to orchestrate the concerted action:

29 RT 294-95, 454; 33 RT 1781; 35 RT 2464	Admission by Viacom Chairman Redstone that by 1997 independent retailers were outcompeting Blockbuster

29 RT 295, 361-62; 32 RT 1515-17; 33 RT 1781-02; 35 RT 2541; 37 RT 3084; 37 RT 3074-77	Blockbuster was losing market share to independents, which generally had lower rental prices
29 RT 293-96	Blockbuster "was failing" and "running out of money," so it halted opening new stores
29 RT 293; Ex. 1 at 38	Testimony of Viacom chairman Redstone that Blockbuster "had tanked"
Ex. 1 at 38-39, 282-83; 29 RT 293-98; 33 RT 1725	Blockbuster's problems caused Viacom's stock price to decline substantially
29 RT 302, 417; Ex. 1 at 39	Viacom's chairman was "humiliated" and "couldn't sleep at night because of what was happening to Blockbuster" and the resulting media reports
Ex. 1 at 286	Blockbuster "was taking Viacom and [its chairman] personally down the tubes with it"
31 RT 1215	The "life blood of the video business is the new release business"
33 RT 1676	In 1997, new releases comprised 82% of the demand for video rentals

Ex. 69 at 1923; Ex. 453 at 13525	The studio defendants controlled almost 90% of the home-video market in 1997
Ex. 74 at 13082; 29 RT 293, 358	Blockbuster was the largest video retailer in the nation, with 24% of the national market
29 RT 307-15, 557; 30 RT 795; 32 RT 1521; 33 RT 1676; Ex. 1 at 284, 290; 33 RT 1686-90; 37 RT 3092	The $65 traditional price and cherry-pick revenue percentage were too high to permit Blockbuster and independent retailers to buy sufficient copies of all new releases to meet customer demand

2. The studios' admitted exchange of current pricing information:

32 RT 1604-05; 33 RT 1715; 36 RT 2725-40, 2761; Exs. 50, 275; Exs. 41, 4064	Fox's files contained the "confidential" Disney-Blockbuster contract and a grid detailing the key Disney terms, on which Fox's head lawyer wrote, "Disney Deals," "Confidential."
32 RT 1598, 1606; 33 RT 1717-22	Disney admitted that there was "[n]o legitimate reason whatsoever" for its Blockbuster contract to be in Fox's files, but it was

29 RT 531; 30 RT 846; 31 RT 1002; 32 RT 1610; 36 RT 2741-49, 2807-09	Studio defendants' admissions that they routinely sought and obtained, through Blockbuster and distributors, each others' current pricing and contract terms
33 RT 1966-72; 30 RT 875, 887-88	Distributor Ingram Entertainment repeatedly requested Blockbuster output revenue sharing on independent retailers' behalf
31 RT 1098-1101; 32 RT 1569; 33 RT 1797-99, 1984-88; 34 RT 2016, 2165; 35 RT 2580; 36 RT 2791, 2828-32	In December 1998, Ingram wrote to each of the studio defendants, with copies to each other studio, that the output revenue sharing given Blockbuster and other large chains created an unfair advantage
32 RT 1568-69; 33 RT 1799; 36 RT 2792, 2830	Distributor Ingram noted that the disparity had allowed the large chains "to grab market share by literally suffocating the [independent retailers] with their depth of copy and five-to-seven-night rental periods"

Ex. 6 at 1764; 29 RT 527-28	Warner internal memo referencing details of a proposed Disney revenue sharing deal, including Disney's specific revenue split

3. Blockbuster's request to the studios for a favored deal not to be given to the plaintiffs:

Ex. 18 at 6839; Ex. 44 at 3467; 34 RT 2131-34, 2147-52; 35 RT 2541-45	During negotiations, Blockbuster discussed its financial troubles and market-share decline, and told them that it intended to increase its market share to 40-50% by "'owning' new release availability"
35 RT 2474-75; Ex. 500	Fox vice-president told a retailer that Blockbuster "had propositioned [Fox] for a special deal, and that [Blockbuster] did not want it to be given to independents."
35 RT 2474-75; Ex. 500	Fox indicated that it was not succumbing to "the pressures of Blockbuster," but later did after suffering purchase cuts

22 RT 5134 (order of June 6, 2002 denying Blockbuster's motion for reconsideration)	According to the District Court, "a reasonable juror could conclude from evidence that Blockbuster asked Fox for an exclusive deal, that Blockbuster also asked the other studio defendants for an exclusive deal."
Ex. 1105	December 1997 Fox memorandum described Blockbuster's proposal as creating a "favored revenue share relationship" versus other studio customers
Ex. 6 at 1765	February 1998 Warner memorandum: "It is likely the trade will know there is a difference in the revenue split with Blockbuster and with everyone else, and give additional support to studios who have not made such a deal with their largest competitor"
Ex. 11 at 4564	Synopsis of Warner's first meeting with Viacom's chairman stated that Blockbuster's "requested concessions" "[c]ould spur government inquiry into video industry pricing practices."

29 RT 496-98	Warner witness testimony that Blockbuster sought favored pricing
Ex. 70 at 1563	October 1997 Disney memorandum seeking CEO approval of the Blockbuster deal: "Blockbuster represents 20-25% of the rental business and we hope to roll this out to a few other key retailers representing another 15-20%."
32 RT 1501-02, 1576-79	Disney witness confirmation that the omitted 55% were the independent retailers and that Disney's plan was to make the Blockbuster terms available only to Blockbuster and other large retailers comprising 45% of the market
Ex. 43 at 3774	February 1998 Fox memo: "[t]he increased copy depth and lower cost to Blockbuster will place Blockbuster at a severe competitive advantage over other rental retailers"

29 RT 308-18, 325, 330, 467, 488-89; 30 RT 794-95; 32 RT 1530; 34 RT 2104-09; 35 RT 2534-36	Because traditional sales and cherry-pick revenue sharing did not permit copy depth and copy breadth, Blockbuster demanded a new pricing model allowing sufficient copies of every new release
Ex. 500; 35 RT 2474-77	Blockbuster "pressuring" Fox for "special deals" not available to independents
Ex. 43 at 3772	Fox noting "Blockbuster has threatened to reduce purchases of Fox titles if we fail to change the current conventional model"
Ex. 11 at 4567, 4563	Warner noting Blockbuster will "target[ ] studios who do not provide concessions." Warner noting Blockbuster will reduce purchases if studios "do not provide price concessions"
Ex. 19 at 1586	Warner noting "Blockbuster has clearly indicated that they will cut orders on product not available on revenue sharing"

Ex. 1 at 294	Blockbuster cut purchases from "non-participating studios by approximately 25 percent". It was the studio defendants' largest buyer in 1997 by far, with a 24% share of the nationwide market
32 RT 1525; Ex. 74 at 13082, 13103	Blockbuster "4x the size of its nearest competitor." Fox joined only after Blockbuster reduced its purchases in response to Fox's reluctance and recommended its franchisees do the same
35 RT 2472; 36 RT 2616-21, 2705-06; Ex. 61 at 3433; Ex. 971 at ¶¶ 3-4	Absence of Blockbuster deal "continues to drastically affect [Fox's] rental numbers"

4. Timing of Meetings and Price Decisions:

29 RT 316-17	Viacom chairman Redstone met in Summer 1997 with several studio defendants to demand lower pricing for Blockbuster
29 RT 318-21; 36 RT 2769-75	Viacom chairman Redstone first met with Paramount to determine how to get the other studio defendants to accept Blockbuster's plan

Ex. 1 at 293; 29 RT 322, 350; 36 RT 2777-80	Paramount and Blockbuster began output revenue sharing in late 1997, but delayed formal contract until after Blockbuster signed the largest studios
Ex. 553 at 6; 29 RT 346, 453; 37 RT 3065-66	By late 1997, Blockbuster had output revenue sharing arrangements with several studio defendants
Ex. 1 at 292	Blockbuster structured the negotiation order to provide leverage over the remaining studios, with formal contracts taking longer
29 RT 338-39; Ex. 1 at 292; Ex. 81	Blockbuster signed formal contract with Disney first, in November 1997, because it was "number one in th[e] video business"
Ex. 1 at 294, Ex. 34; 29 RT 348-49; 33 RT 1675	Next was Warner, in April 1998, because Disney, Warner and Paramount comprised over 50% of the market
Ex. 1 at 294	With those studios on board, Blockbuster knew that the others "had to play."
30 RT 797; Ex. 247	Universal began output revenue sharing with Blockbuster in April 1998 and signed long-form contract that October

34 RT 2095; Ex. 126	Columbia began output revenue sharing in late 1997 and signed a long-form contract in August 1998
Ex. 63	Fox began output revenue sharing in September 1998 and signed in November 1998

Part C. Selected Record Evidence Relating to Defendants' Justifications

The studio defendants sought to justify their failure to provide Blockbuster-type programs to plaintiffs by stating that petitioners did not want, or could not do, output revenue sharing. Such statements can be found at:

29 RT 403-04; 30 RT 820-21, 864, 888; 31 RT 956-57, 997, 1099-1104, 1169; 32 RT 1488, 1552-59; 33 RT 1671, 1796; 34 RT 2130, 2184; 36 RT 2672, 2800, 2857	Defendants' testimony that petitioners did not want, or could not do, output revenue sharing

- Petitioners' evidence to dispute these contentions includes:

1. Evidence that distributors and independent retailers repeatedly requested Blockbuster-type deals:

33 RT 1966-72; 30 RT 875, 887-88	Distributor Ingram Entertainment, repeatedly requested Blockbuster output revenue sharing terms on behalf of the independent retailers
31 RT 1098-1101; 32 RT 1568-69; 33 RT 1797-99, 1984-88; 34 RT 2016; 35 RT 2580; 36 RT 2791, 2828-32	In December 1998, Ingram told studios: "[o]utput deals had not been available to all retailers," allowing large chains "to grab market share by literally suffocating" the independent retailers
34 RT 2026-30, 2045; 36 RT 2796-97	In November 2000, Ingram told the studios that the lack of competitive pricing persisted, and that "something is wrong here"
34 RT 2051-52	Ingram's 2001 Strategic Plan promised to "continue to request [that the] studios level the playing field" for independents by making output deals available
Ex. 4039 at 985; Ex. 4058 at 2648; Ex. 4081 at 3525; 36 RT 2629-31	Rentrak requested output revenue sharing and "expect[ed] a majority of our retail customers" to shift to output terms if the studios would offer them

33 RT 1827-28, 1857; 34 RT 2062	Retailers asked Ingram for "the option of the same output deals that are available to Blockbuster"
30 RT 651-53	In February 1999, independent retailers met with several studio defendants to request the Blockbuster deal
34 RT 2175-76	Plaintiff 49'er Video's owner: independents sought "equality to the purchasing"
34 RT 2182-83	Retailers said they needed "[o]utput agreements to be competitive"
30 RT 664, 667, 751	Columbia: independents requested the Blockbuster deal and had additional meetings where they asked the "studios to give [them] the same kind of deal that they were giving Blockbuster"

2. Studio documents indicating that output revenue sharing could be offered through distributors, and independent retailers could do output deals:

Ex. 260 at 1583, 1608; 30 RT 862-64	In mid-1999, Universal's staff told management that because Blockbuster was rapidly gaining market share at the expense of independent retailers "who are unable to compete," Universal should "[r]evise Rentrak agreement to include, among other changes, output option and more competitive terms" and should "[d]evelop Revenue Sharing model for distribution that includes output and cherry picking options."
31 RT 1119	Universal's failure to explain why Universal's internal documents recommended developing output options for distributors despite its claim that it had previously offered them and had them rejected
Ex. 453 at 13541	Universal stated in January 2000 that "[m]ost small retailers still don't have reasonably priced access"

3. Defendants' admissions that there was no documentary evidence that independents or distributors were offered, and then rejected, Blockbuster-type deals:

31 RT 1101-02, 1117-18, 1171	Universal admission that no document showed Universal even proposed Blockbuster terms to a distributor
32 RT 1583-85	Disney admission that there is "[n]ot a single piece of paper" indicating retailers told Disney they didn't want output deals
32 RT 1592	Disney admission that none of the thousands who purportedly refused output deals did so in writing

4. Evidence that some studio defendants did offer output revenue sharing deals through distributors after plaintiffs filed this lawsuit in 1999, offered deals containing terms materially worse than Blockbuster's deal, or both:

30 RT 868-72 & 31 RT 1029-39	Universal began offering output revenue sharing through disributor Rentrak in 2001, but with Universal's share higher than under Blockbuster's deal
36 RT 2633, 2642-52, 2662; Ex. 406	Fox started offering output revenue sharing through distributor Rentrak in April 2000, but with terms worse than Blockbuster's deal

30 RT 661 & 765-66; 37 RT 2923-26, 2944	Warner offered an output program through Ingram in 1998 but required independent retailers to meet arbitrary national sales goal, whereas Warner based Blockbuster's commitments on prior purchases and "what the market has absorbed"
37 RT 2926-29	Analysis of inferior MGM-Rentrak output deal

5. The studio defendants did not test the Blockbuster terms through distributors:

31 RT 1067	Universal decided on its own not to offer distributors the Blockbuster terms because it knew "no one would take them"
32 RT 1579-80	Same as to Disney

6. Evidence that independents had sufficient technological means for Blockbuster-type deals.

• Defendants claimed independents lacked the necessary computers and software. (30 RT 911; 31 RT 1144) Defendants' witnesses admitted that these purported problems could be solved by offering the program through distributors, as noted at:

30 RT 910-22 & 31 RT 1061, 1163-64, 1180-82	Universal could have resolved administrative and reporting concerns by making Blockbuster terms available through distributors
30 RT 763	Independents asked studios to use revenue-sharing resources of Rentrak and Supercomm (a distributor previously servicing grocery stores) to make output revenue sharing available to them
32 RT 1647-49; 33 RT 1742-44; Ex. 3015	Disney admission that Supercomm could be used to offer revenue sharing to small indeendents
Ex. 19 at 1591	Warner discussion of various options
29 RT 560; 32 RT 1589-91, 1644-46; 33 RT 1741	At least 4500 locations had computer/data systems because of Rentrak
34 RT 2071; 34 RT 2182; 35 RT 2582; Ex. 3015 at 2	Most retailers had computer systems to do revenue sharing through distributors

30 RT 761-62; 33 RT 1811, 1894	Plaintiffs 49'er Video and Big Picture already had their stores computerized and wired for revenue sharing
31 RT 1221-22	Plaintiff Cleveland had computers, software capacity, no objection to the studios auditing his records, and a large store comparable to most Blockbuster locations
29 RT 566-67; 30 RT 714-19, 751-52, 764-66, 776; 31 RT 1218, 1274-76; 32 RT 1296; 33 RT 1810-11, 1853	All three plaintiffs' testimony that they wanted, and could do, output revenue sharing

Part D. Selected Record Evidence Regarding Robinson-Patman Issues

1. The number of copies that Blockbuster purchased of each movie was based on that movie's theatrical box office performance before its video release, based on Blockbuster's historical rental data. Thus, under its output deals Blockbuster committed to take only a few copies of poor performing movies, and got many copies of the best performing movies.

Disney: Ex. 81 at 946, Ex. 70 at 1567; Fox: Ex. 63 at 17; Columbia: Ex. 126 at 3817-18; Universal: Ex. 247 at 3557-58	Blockbuster's per-store commitments under Disney deal ranged from 4 copies of movies with less than $3 million in box office revenues to 75 copies of movies with over $150 million

	in box office revenues, based on Blockbuster's historical purchase data. Blockbuster had similar requirements with each studio under its output revenue sharing deals, i.e., the number it was required to take varied according to that movie's theatrical box office performance, and was as low as 1-2 copies of each movie per store

2. Evidence that the favored output deals achieved Blockbuster's intended purposes by giving it a competitive advantage as to the new-release market, increasing its market share vis-à-vis the independents, and causing damage to independents includes:

Ex. 18 at 6838; Ex. 74 at 13105; 29 RT 387-90	Viacom chairman Redstone's admissions that the purpose of Blockbuster's new pricing model was to allow it to increase its market share by taking sales mostly from independents
29 RT 365-66	Blockbuster projected independent retailers "would be hurt the most"
29 RT 396-97; 37 RT 3201	Blockbuster deals made "mom-and-pop" stores vulnerable

Ex. 43 at 3774	Revenue sharing "will place Blockbuster at a severe competitive advantage"
29 RT 309	Viacom chairman Redstone knew that consumers would go to stores with sufficient copies of new releases
29 RT 387-88; Ex. 179 at 4930	Blockbuster gained rental share "at an accelerated pace"
37 RT 3064-65, 3082	Blockbuster admission that revenue sharing caused its rebound
29 RT 399	"Guaranteed in-store availability" drove Blockbuster's numbers
37 RT 3085-88; Ex. 182 at 5370	Blockbuster admission that new copy depth/breadth caused "a nearly 30% increase in new release film rentals"
29 RT 358-60, 366; 31 RT 1071; Ex. 74 at 13082	After Blockbuster obtained the output deals, its market share grew from 24% in 1997, to 27% in 1998, to 38% by 2001

Ex. 184 at 87; 29 RT 356; 35 RT 2556	Each market share percentage point represented an $80 million revenue increase
29 RT 369-70	The 14% increase represented an annual $1.120 billion shift in business from other retailers to Blockbuster
Ex. 258 at 13366	"Competitive advantage of direct revenue sharing" allowed Blockbuster to "aggressively captur[e] market share at the expense of the smaller independent retailers"
Ex. 260 at 1583	Blockbuster's gains mostly "at the expense of the smaller chains and independents who are unable to compete"
Ex. 2 at 17562	"Market share shift from independents to Blockbuster"
Ex. 453 at 13545	"Blockbuster has increased its market share to approximately 40% with substantial portions of that gain coming from independent retailers"

Ex. 39 at 114	"Growth is Occurring at the Expense of the Independents"
34 RT 2023; also 31 RT 1169	"Blockbuster's copy depth gave them an advantage in cases where there was competition in market between independents and Blockbuster"
31 RT 1071-72	Universal knew Blockbuster's market share increases were mostly at independents' expense
35 RT 2583-85 & 36 RT 2709-13	Fox knew Blockbuster's 1998-1999 market share increases were at independents' expense
37 RT 3097	Blockbuster knew it gained significant market share from independents
Ex. 2 at 17551	Warner: "Rentrak estimates that independents were closing at a rate of 300-400 per month" as of 11/98
Ex. 453 at 13531	Universal: the "industry has seen a net loss of more than 5,000+ specialty stores in the last 2 years"

34 RT 2019; 2076	Ingram: price disparity causing "an unusually large number of dealers" to go out of business
36 RT 2835-36	Warner knew in late 1999 that 10% of independent stores closed in 1998 and almost 3000 stores in last 18 months
Ex. 554 at 21	Blockbuster: market share gains came from places customers would not "be able to go back to"
29 RT 462; Ex. 260 at 1583, 1593	Blockbuster's 1998 marketing "increased dramatically", and its aggressive promotional campaigns to increase market share were "largely funded by the direct revenue sharing"
30 RT 902-03; 35 RT 2558; 37 RT 3214-15	Universal's promotional credits to Blockbuster were "high" – 14% of gross revenues by 2000
Ex. 182 at 5371	Blockbuster CEO had "never seen a business respond so quickly, so positively and with such dramatic results as I've seen at Blockbuster" a year after revenue sharing

29 RT 455	Copy depth and promotional support allowed Blockbuster to advertise that customers could always find the new movie they wanted
35 RT 2302-08	Plaintiffs' expert Dr. Leitzinger: Blockbuster's favored pricing allowed it to take market share from all three plaintiffs
35 RT 2302-03, 2436; 35 RT 2304-05	Blockbuster's "DMA" data showed that its market share grew from 35% to over 50% in Cleveland's market, from 20% to almost 35% in 49'er Video's market, and from 15% to just over 20% in Big Picture's market
35 RT 2306-08, 2450; 35 RT 2308-11	From 1997 through 2001, plaintiffs' video-rental sales versus Blockbuster stores within three miles of plaintiffs' stores: Cleveland lost 53% of sales while Blockbuster's sales grew 78%; 49'er Video lost 52% of sales while Blockbuster's sales grew 99%; and Big Picture lost 47% of sales while Blockbuster's sales grew 38%

3. There was also evidence that distributors had the ability to undertake long-term contracts like the Blockbuster deals. *See* Part C(2)-C(5), *supra* (App. 70-73).

No. 03-917

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RONALD CLEVELAND, D/B/A LONE STAR VIDEOTRONICS; PHOENIX-MERCHANT INVESTMENTS INC., D/B/A 49ER VIDEO; THE BIG PICTURE VIDEO INC.,

Petitioners,

v.

VIACOM INC.; PARAMOUNT HOME VIDEO INC.; BUENA VISTA HOME ENTERTAINMENT INC.; COLUMBIA TRI-STAR HOME VIDEO INC.; UNIVERSAL STUDIOS HOME VIDEO INC.; TWENTIETH CENTURY FOX HOME ENTERTAINMENT INC.; BLOCKBUSTER INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should grant a writ of certiorari in this antitrust conspiracy case to review the Fifth Circuit's unpublished decision affirming judgment as a matter of law for respondents based on the Fifth Circuit's application of the well-settled standard set forth in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), to petitioners' circumstantial evidence of conspiracy, resulting in an opinion that is entirely in accord with the decisions of other circuits in similar cases.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents advise the Court that the following is a list of their corporate parents and the publicly traded companies that own 10% or more of any of them:

Viacom Inc.

Paramount Pictures

Fox Entertainment Group Inc.

Disney Enterprises, Inc.

Sony Pictures Entertainment

Universal Home Video LLC

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EXPLANATION OF RECORD CITATIONS

"Pet." refers to the Petition for Writ of Certiorari.

"Pet. App." refers to the Appendix attached to the Petition for Writ of Certiorari.

"__R__" refers to the Record on Appeal cited by volume and page number.

"__RT__" refers to the Reporter's Transcript in the Record on Appeal (Volumes 28 – 37) cited by volume and page number.

"PX-__" refers to Plaintiffs' trial exhibits cited by exhibit number.

"DX-__" refers to Defendants' trial exhibits cited by exhibit number.

RESPONDENTS' BRIEF IN OPPOSITION

Petitioners brought this antitrust conspiracy case against Blockbuster Inc., Blockbuster's majority shareholder, Viacom Inc., and the home video units of the principal Hollywood movie studios (collectively, "studios")—Buena Vista Home Entertainment, Inc. ("Disney"), Columbia Tri-Star Home Video, Inc. ("Columbia"), Twentieth Century Fox Home Entertainment, Inc. ("Fox"), Universal Studios Home Video, Inc. ("Universal"), Warner Home Video ("Warner"), MGM Home Entertainment ("MGM"), and Paramount Home Video, Inc. ("Paramount"). This action arises out of Blockbuster's negotiation of separate VHS videocassette revenue-sharing agreements with each of these studios starting in 1997.

Petitioners allege that respondents engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act. As their petition makes plain, petitioners' claim hinges on circumstantial evidence allegedly establishing that the studios engaged in consciously parallel conduct that was against their individual economic interests and therefore was more likely the result of illicit collusion than independent business judgments. In an unpublished opinion, the Fifth Circuit ruled that petitioners' circumstantial evidence was insufficient to survive respondents' motion for judgment as a matter of law. The court of appeals recognized, and petitioners do not dispute, that this Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), furnishes the standard for determining whether petitioners' ambiguous circumstantial evidence raised a fact question for the jury to decide. Carefully applying the *Matsushita* standard, the Fifth Circuit correctly concluded that petitioners failed to produce evidence that "tended to exclude the possibility of independent conduct."

Petitioners claim, however, that the Fifth Circuit erred by treating as "dispositive" evidence that respondents' conduct was the result of independent, legitimate business decisions, thereby creating a "more restrictive standard for summary disposition

of antitrust cases which sharply diverges from the law in other circuits." Pet. at 12, 18-19.

In truth, the Fifth Circuit did not articulate a new standard for summary adjudication of antitrust conspiracy claims. The Fifth Circuit merely concluded that petitioners' evidence in this case did not tend to exclude legitimate explanations for respondents' conduct. In reaching this conclusion, the Fifth Circuit did not treat evidence of business justification as "dispositive" of the conspiracy question. Respondents' business justifications were "dispositive" only in the sense that the evidence petitioners offered did not sufficiently rebut them, entitling respondents to judgment as a matter of law. This conclusion flows directly from *Matsushita* and its progeny in the various courts of appeals, demonstrating that the circuit conflict petitioners attempt to manufacture does not exist.

Thus, the Fifth Circuit did not, as petitioners contend, "eliminate" the theory of conscious parallelism as an avenue of proof, it did not require that petitioners "disprove with 100 percent certainty defendants' proferred business justification," and it did not decide that "as a matter of law whenever a defendant proffers any business reason for its conduct, such evidence—even if contested by direct evidence—trumps evidence showing consciously parallel conduct against interest." Pet. at 13-14, 26. To the contrary, the Fifth Circuit vigilantly applied well-settled legal principles governing antitrust conspiracy claims based on circumstantial proof. Petitioners therefore present no issues that warrant this Court's review.[1]

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[1] Moreover, petitioners' request for review wholly depends on the premise that "the defendants' purported explanation for why their conduct should not be viewed as against their individual interests is controverted by direct evidence from third parties." Pet. at 18. Thus, to grant the requested writ of certiorari, this Court would have to review all of the evidence in the record to determine whether the evidence petitioners cite truly "contradicts" and "controverts" the evidence showing that defendants acted independently. As we explain below, petitioners'

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STATEMENT

Factual Background[2]

In 1997, the home video rental market was sagging. Rental transactions for all retailers were flat or declining.[3] For years, video rental retailers had operated under a model of "managed customer dissatisfaction" by buying a limited number of copies of new release titles to attract customers to the store and then steering customers to older, "library" titles when the store ran out of new releases.[4] As alternative forms of movie entertainment (such as DirecTV, pay-per-view, and the Internet) emerged, however, customers began walking out of video stores empty-handed and turning to other entertainment sources instead of renting library titles as their second choice.[5] For example, by 1997, a remarkable thirty percent of Blockbuster's customers were walking out of their local Blockbuster stores without a movie because Blockbuster had not stocked enough copies of new releases.[6]

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evidence actually supports, rather than contradicts, respondents' position. But more importantly, petitioners' request for review plainly rests on their disagreement with the Fifth Circuit's interpretation of the evidence, not on an asserted error of law.

[2] Petitioners' factual background section does not present a complete picture of the video rental industry and contains numerous "facts" unsupported by the record. Thus, respondents include this factual background to provide context for the Court. Respondents' arguments, however, treat petitioners' factual allegations in the light most favorable to them, as the standard for deciding Rule 50 motions requires.

[3] *See* 31RT1138-39, 1210; 32RT1627-28; 33RT1674; 37RT3153-54.

[4] *See* 29RT315, 474; 33RT1844-45; 37RT3147-48; PX-19 at 2.

[5] *See* PX-19 at 2-3; 37RT3154.

[6] *See* 37RT3148.

In the late 1980s, video distributors, led by Rentrak Corporation of Portland, Oregon, had begun offering retailers revenue-sharing terms as a way to address the increasing copy-depth problem in the industry, but not every retailer took advantage of the Rentrak option.[7]

Under revenue-sharing arrangements, studios lease tapes to retailers for lower "up-front" payments in return for a share (or "split") of a retailer's rental revenues.[8] Revenue sharing allows retailers to acquire more copies of titles to satisfy initially high consumer demand, while still providing a predictable revenue stream for the studios.[9] For video retailers, revenue sharing is a low-margin, high-volume model that depends on spending more on inventory, managing the increased inventory, spending more to advertise the increased inventory, and, most importantly of all, achieving a substantial increase, or "lift," in rental business to offset higher costs.[10]

There are generally two forms of revenue sharing in the video business—output and "cherry-pick." Under output revenue sharing, a retailer must acquire all movie titles a studio releases, regardless of the title's box office performance or popularity in the retailer's local markets.[11] In return for accepting the risk of an output obligation, retailers keep a higher percentage or "split" of the rental revenue. "Cherry-pick" revenue sharing allows a retailer to pick and choose the titles it will acquire; in exchange for this option, the retailer pays the studio a higher percentage of its rental revenue from the titles it chooses.

Under the leadership of its new CEO, John Antioco, Blockbuster began exploring revenue-sharing deals in 1997 as

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[7] *See* 29RT305.

[8] *See* 29RT332-33; 37RT3159-60.

[9] *See* 32RT1633; 37RT3159-60.

[10] *See* 29RT331-32; 37RT3159-60.

[11] *See* 29RT325-26, 331-32, 447-48; 36RT2802.

part of a new business model designed to satisfy customer demand and to improve customer experience in Blockbuster stores.[12] Blockbuster developed its new business model in response to increasing customer dissatisfaction and growing chain competition.[13]

Blockbuster, which recently had invested millions building its own 900,000-square-foot distribution center, determined it could administer its own revenue-sharing programs with the studios instead of using Rentrak.[14] After negotiations that spanned more than a year, Blockbuster reached separate revenue-sharing agreements with each of the studios. Although the agreements generally allowed Blockbuster to retain 55% to 65% and return to each studio 35% to 45% of rental revenue, the terms of each Blockbuster revenue-sharing contract varied in important and material respects.[15] Significantly, none of the agreements prohibited a studio from giving identical or even better revenue-sharing terms to other video retailers or distributors, and each defendant adamantly denies agreeing with Blockbuster or with any other defendant to refuse equivalent terms to petitioners.[16]

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[12] *See* 37RT3149-51; 29RT443-44. There were many facets to Blockbuster's new business model, but the primary components included a broader selection of titles and a larger number of videocassettes, attractive and conveniently-located stores, a renewed emphasis on customer service, competitive pricing and rental terms, a rejuvenated advertising and marketing strategy, and a growth strategy built on adding new company and franchise stores and acquiring existing stores. 37RT3082-86, 3150-51, 3183-84; PX-7 at 53-56.

[13] Blockbuster's principal competitor, Hollywood Video, used revenue sharing through Rentrak to increase its copy depth and compete more effectively against Blockbuster. *See* 30RT623; 37RT3140-42.

[14] *See* 37RT3177; 29RT305.

[15] *See* 37RT3100-01.

[16] *See* 37RT3162-64, 3199-3200; 29RT435-36; 31RT975-76, 1155; 32RT1634; 34RT2242, 2245; 36RT2672-73, 2678, 2687-88, 2811.

To secure the rental-revenue splits it negotiated, Blockbuster made expensive and risky commitments. The output aspect of the agreements requires Blockbuster to acquire virtually every one of the hundreds of movie titles released by the studios.[17] Each Blockbuster company store must participate in the revenue-sharing program, regardless of whether revenue sharing is optimal for that particular store.[18] Blockbuster must also pay some studios a minimum payment, or "title guarantee," for each title it acquires, regardless of the rental revenue that particular title generates.[19] Moreover, Blockbuster's revenue-sharing agreements were long-term, ranging from two to five years.[20] Additionally, Blockbuster committed to increasing its advertising and marketing expenditures substantially to promote its increased copy depth under revenue sharing.[21]

At the same time (and in some cases, before) they entered into revenue-sharing agreements with Blockbuster, each studio began offering a variety of copy-depth programs to its customers and also entered into direct revenue-sharing agreements with many retailers and distributors.[22] Indeed, petitioners concede that the conspiracy they allege did not prohibit the studios from

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[17] *See* 37RT3154-55.

[18] *See* 37RT3168-70.

[19] *See* 37RT3171.

[20] *See* 37RT3156-57. Most of the agreements at issue in this case have expired. With the advent of DVDs, which were not covered by Blockbuster's original revenue-sharing agreements, Blockbuster acquires an increasingly smaller percentage of its rental product through revenue-sharing arrangements. Thus, the "new way of doing business" petitioners challenge in this case has itself become nearly obsolete.

[21] *See* 37RT3183-84.

[22] *See* 34RT2154-60; 36RT2782, 2790, 2796-99, 2677; 30RT790-93; PX-309; 35RT2569-70; 31RT959-61, 966-67, 1140, 1178; 32RT1508-10, 1526-27, 1555, 1571, 1583, 1640-42; 33RT1776, 1787, 1793; PX-949; 37RT3025.

giving Blockbuster's most formidable competitors—such as Hollywood Video, Movie Gallery, and other chain video stores—revenue-sharing deals identical to or even better than Blockbuster's deals.

Proceedings Below

Petitioners allege that Blockbuster orchestrated a conspiracy among the studios to deny independent video retailers ("IVRs") the revenue-sharing terms Blockbuster negotiated for itself. Petitioners base their conspiracy claim on circumstantial proof of "consciously parallel conduct against independent self-interest." Pet. at 10. Thus, petitioners acknowledge that there is no direct evidence of conspiracy in this case. *See, e.g.*, Pet. at 29. Moreover, petitioners agree that Blockbuster's revenue-sharing agreements themselves are entirely lawful and procompetitive—that is, good for consumers.[23]

Petitioners assert, however, that respondents unlawfully agreed to deny them these same procompetitive revenue-sharing deals. They claim that the studios acted in consciously parallel fashion by uniformly failing "to agree to revenue sharing on Blockbuster terms with plaintiffs' distributors," although such agreements allegedly would have been in each studio's economic self-interest. Pet. at 9. They also claim that this failure to agree to share revenue with distributors on Blockbuster's terms is against each studio's self-interest and could only reflect conspiratorial conduct because it allegedly had the effect of increasing Blockbuster's market power and driving independents out of business. *See* Pet. at 9-10.

Blockbuster and each studio maintain that the revenue-sharing agreements between them are the result of independent, lawful business negotiations that did not include any discussion of the revenue-sharing terms studios would offer other video retailers, much less an ***agreement*** to deny independent retailers

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[23] *See* 28RT202-203.

revenue-sharing terms equivalent to Blockbuster's terms. Petitioners' case-in-chief at trial included abundant evidence rebutting the allegation that the studios uniformly refused to enter into revenue-sharing agreements with distributors on Blockbuster's terms.[24] Indeed, the evidence demonstrated that each studio offered its customers numerous copy-depth arrangements, including output and "cherry-pick" revenue-sharing deals.[25] The evidence also showed that most independent video retailers and their distributors did not want revenue-sharing terms identical to Blockbuster's,[26] thus rebutting the allegation that a studio's failure to enter into revenue-sharing deals with distributors that were identical to Blockbuster's deals was the result of a conspiracy.

Given the substantial evidence of the unwillingness of petitioners, IVRs, and distributors to agree to the same long-term output obligations as the large chains, the district court and the Fifth Circuit correctly concluded that the evidence,

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[24] *See infra* Part I.B.1. Petitioners chose to call in their case at least one executive from each respondent company, including Sumner Redstone, the Chairman and CEO of Viacom, and John Antioco, the Chairman and CEO of Blockbuster. Thus, all of the "business justification" evidence petitioners cite was presented in their case-in-chief. The district court granted respondents' motion for judgment as a matter of law after the close of petitioners' case.

[25] *See supra* note 22. Petitioners suggest that some studios offered output revenue-sharing terms to distributors only after petitioners filed this lawsuit. *See* Pet. at 9 n.9, 10 n.13. In truth, the evidence shows that studios began negotiating output deals with distributors long before this lawsuit was filed. *See, e.g.*, 35RT2573-74. For example, Fox began negotiating an output revenue-sharing deal with Rentrak at least as early as December 1998, and it took Fox approximately the same amount of time to conclude that deal as it did to conclude its deal with Blockbuster. *See id.*; *see also* DX-4039; DX-4058; DX-4081; 36RT2662-63.

[26] *See infra* Part I.B.1.

taken as a whole, did not tend to exclude the possibility of independent conduct by respondents.[27]

REASONS TO DENY THE WRIT

I. The Fifth Circuit Correctly Applied This Court's Summary Adjudication Standard For Antitrust Conspiracy Claims.

A. This Court's decisions restrict the range of permissible inferences in antitrust cases.

Relying and expanding on *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), this Court set forth in *Matsushita* the standard that lower courts must apply to summary adjudications of antitrust conspiracy claims under Section 1 of the Sherman Act.[28] Observing that general summary judgment principles require courts to view inferences from the evidence in the light most favorable to the nonmovant, the Court nevertheless held that special considerations apply in the antitrust context:

> But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto* . . . , we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment or for a directed

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[27] Petitioners and their counsel are pursuing an identical action in California state court. On February 20, 2003, the California court granted respondents' motion for summary judgment, dismissing in their entirety the identical claims at issue here. Like the lower courts here, the California court found that "[t]aken as a whole, plaintiffs' evidence does not point to conspiracy as more likely than permissible competition."

[28] As the Court points out in its opinion, the principles articulated in *Matsushita* apply equally at the summary judgment and directed verdict (*i.e.*, judgment as a matter of law) stages. *See* 475 U.S. at 588.

> verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. . . . Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Matsushita, 475 U.S. at 588 (citations omitted). The Court explained that these limitations on circumstantial evidence of conspiracy are necessary because "mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594; *see also Monsanto*, 465 U.S. at 763 (permitting inferences from ambiguous evidence "could deter or penalize perfectly legitimate conduct").

The *Matsushita* standard also applies to petitioners' claim under the Cartwright Act, California's analog to the Sherman Act.[29] In *Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493 (Cal. 2001), the California Supreme Court adopted the *Matsushita* standard for evaluating antitrust conspiracy claims under the Cartwright Act. In that case, the plaintiff, on behalf of herself and all other retail consumers of CARB gasoline, sued numerous petroleum companies for conspiring to fix prices. The defendants moved for summary judgment, presenting declarations from each company "generally stating on personal knowledge how the company made its capacity, production, and pricing decisions about CARB gasoline, asserting that it did so independently, and denying that it did so collusively with any of the others." 24 P.3d at 503. The plaintiff opposed the motion with expert testimony and evidence that the petroleum companies gathered and disseminated pricing and other trade

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[29] Petitioners' only claim for damages in this case arises under the California Cartwright Act, which, unlike the Sherman Act, allows indirect purchasers to sue for damages. Petitioners seek only injunctive relief under the Sherman Act.

information, used common consultants, and executed exchange agreements to trade petroleum products.

Applying the standard set forth in *Matsushita*, the California Supreme Court affirmed summary judgment for the defendants, finding that the plaintiffs had not presented evidence that tended to exclude the possibility of independent conduct. Addressing the plaintiff's attempt to rebut the defendants' evidence of business justification, the *Aguilar* court noted that an antitrust plaintiff "may not make it to trial 'by merely asserting' that a reasonable trier of fact 'might, and legally could, disbelieve' [the defendants'] denial 'without offering any concrete evidence from which' such a trier of fact could find in his favor." 24 P.3d at 508 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986)). The *Aguilar* court explained:

> [E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself.

Id. at 514-15 (citations omitted) (emphasis in original).

Petitioners in this case do not challenge the *Matsushita* standard, acknowledging that they cannot rely solely on conduct as consistent with conspiracy as with independent action.[30]

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[30] Petitioners go to great lengths to argue that *Matsushita* does not impose a "special burden" on antitrust plaintiffs. Pet. at 21. But whether or not the *Matsushita* standard is described as "special," this Court was clear that antitrust law restricts the range of permissible inferences at the summary adjudication stage. Thus, while a plaintiff in an ordinary case might be able to survive a motion for judgment as a matter of law by presenting evidence that is equally consistent with its theory of the

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Instead, they challenge the Fifth Circuit's application of that standard in this case. This clearly does not present an issue warranting this Court's review. *See, e.g.*, SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").[31] In any event, the Fifth Circuit correctly applied *Matsushita* to the evidence presented in this case.

B. The Fifth Circuit correctly held that petitioners failed to produce evidence that "tends to exclude the possibility of independent conduct."

As their petition makes plain, petitioners' conspiracy case rests exclusively on their theory of conscious parallelism.[32]

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case as with the defendant's theory of the case, an antitrust plaintiff cannot—he must present evidence that tends to exclude the possibility of independent conduct. Only then can a "reasonable" inference of conspiracy arise to defeat judgment as a matter of law. As the Eleventh Circuit Court of Appeals has put it (in a case petitioners cite), "[e]quipoise is not enough to take the case to the jury." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003).

[31] For the same reason, the Fifth Circuit's ruling affirming judgment as a matter of law on petitioners' Robinson-Patman claims does not merit this Court's attention, because the petition for certiorari on this issue is expressly and solely premised on the argument that the Fifth Circuit simply misapplied the principles of *F.T.C. v. Morton Salt*, 334 U.S. 37 (1948), to the facts of this case. *See* Pet. at 27-29. In any event, it is clear from the Fifth Circuit's opinion that it correctly concluded that petitioners' price discrimination claims are factually and legally unsupportable.

[32] Blockbuster argued below that petitioners' theory that the ***studios*** acted in a parallel fashion contrary to their interests is insufficient to implicate ***Blockbuster*** in the alleged conspiracy. Petitioners claim, however, that Blockbuster is "liable as a participant" in the alleged

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When antitrust claimants lack direct evidence of conspiracy, they may rely on "circumstantial evidence of parallel conduct among the competitors." *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984). However, to avoid summary judgment or judgment as a matter of law under this theory, "the plaintiff cannot rely on proof of parallel behavior alone; significant probative evidence of conscious parallelism is required, 'with . . . some "plus" factor which tends to indicate that the asserted unilateral behavior was not such in fact. . . .'" *Id.* (quoting *Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983)). Although there are others, the most common "plus factor" is evidence that the defendants engaged in conduct "'which was contrary to their economic self-interest so as not to amount to a good faith business judgment.'" *Id.* (citation omitted). Petitioners rely only on this "act against interest" plus factor in this case.

Petitioners claim that the studios acted in a consciously parallel fashion by failing to agree with petitioners' distributors on revenue-sharing terms identical to Blockbuster's terms and that this conduct was against the studios' economic self-interest.[33] Respondents not only challenged this proof but also

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conspiracy because it "organized" and "instigated" it. *See* Pet. at 7. Blockbuster demonstrated below that petitioners presented no evidence from which a reasonable jury could infer that Blockbuster participated in the alleged conspiracy, and the Fifth Circuit agreed, holding that petitioners' evidence that Blockbuster had the motive and opportunity to conspire with the studios was insufficient. *See* Pet. App. at 5-7. As the court of appeals observed, a "company can set ambitious competitive goals for itself, such as 'owning' a portion of the market or significantly increasing its market share, without giving rise to a presumption that it intends to use illegal means to achieve those goals." *Id.* at 5-6.

[33] As respondents argued below, petitioners failed to establish a prima facie case of conscious parallelism. The evidence shows that the studios addressed the video industry's copy depth problem in vastly
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rebutted it with evidence that distributors would not agree to Blockbuster-style revenue sharing. Petitioners do not claim that this evidence of business justification was inadequate to rebut petitioners' prima facie case of conscious parallelism plus acts against interest. Instead, petitioners argue that they presented evidence that contradicted respondents' business explanations—in effect, surrebuttal evidence that "tends to exclude the possibility of independent action."[34] Thus, the narrow question presented to and decided by the Fifth Circuit was whether

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different ways, dispelling any notion that their conduct was uniform. *See supra* note 22. Thus, petitioners are well aware that it is ***not*** "undisputed that the conduct at the heart of this case occurred." Pet. at 11. The Fifth Circuit did not address this argument directly, however, and respondents assume, for purposes of this opposition only, that petitioners presented sufficient evidence of parallel conduct.

[34] Petitioners frame their analysis in terms of shifting burdens, claiming that they presented evidence of consciously parallel conduct against the studios' individual economic interests, which respondents rebutted with evidence of business justification, which petitioners, in turn, rebutted with evidence of "pretext," raising a fact issue for the jury. *See* Pet. at 11-12. However, petitioners' "evidence" that the studios acted against their self-interest is simply the evidence of business justification taken out of context. For example, petitioners cite the testimony of a Universal witness that it would be bad business for Universal to deny Blockbuster's revenue-sharing terms to other retailers and claim that this proves that the studios acted against their interests in denying the Blockbuster terms to distributors. *See* Pet. at 9; Pet. App. at 55. But the Universal testimony, read in context, explains that although Universal would have loved for every retailer to accept Blockbuster's revenue-sharing terms because it viewed revenue sharing as a "tool in resurrecting the industry," many independent retailers would not accept the Blockbuster terms because of onerous obligations like payment guarantees and output requirements. *See* 31RT1151-55. Because petitioners' evidence of "acts against interest," put in context, actually establishes that the studios' actions were explained by the fact that many, if not most, independent video retailers would not accept the burdens of Blockbuster-style revenue-sharing, petitioners arguably never raised an issue of fact on "acts against interest" in the first place.

petitioners' evidence tended to exclude the possibility that defendants acted independently. This question did not raise any unsettled issue of law; it merely required the court of appeals to apply this Court's well-settled *Matsushita* standard. The Fifth Circuit correctly did so.

1. The evidence of "business justification"

The record at trial contained ample evidence that when a studio failed to reach revenue-sharing agreements with distributors on terms identical to Blockbuster's, that failure was the result of the unwillingness of distributors and their customers, IVRs, to accept those terms. Contrary to petitioners' contention, the record contains much more than respondents' "self-serving testimony" that IVRs and distributors would not do Blockbuster-style revenue sharing. For example, David Ingram, the only distributor petitioners called to testify at trial, testified that a large percentage of independent retailers simply would not embrace output revenue sharing.[35] Other distributors were openly hostile to revenue sharing, with one describing it as "the ball-and-chain your [video] business doesn't need."[36] Moreover, petitioners themselves testified that they never asked their distributors for output revenue sharing.[37]

All of this testimony was consistent with the evidence that the studios' efforts to interest distributors and IVRs in revenue-sharing deals on Blockbuster's terms were consistently rebuffed. Several studios contacted IVRs directly to determine whether there was any interest in output terms, but got cold receptions.[38] For example, upon finalizing its Blockbuster deal, Universal proposed the same terms to many of the next 100 largest

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[35] *See* 34RT2062, 2078, 2080-84.

[36] *See* 32RT1306-07.

[37] *See* 30RT720; 31RT1226-27.

[38] *See* 31RT1148-52; 32RT1555; 34RT2157-58.

retailers.[39] Almost without exception, smaller retailers declined to participate because of output and minimum guarantee requirements.[40] Several studios even offered direct output revenue-sharing arrangements to two of the petitioners.[41] But these two petitioners (and the group representing them) never responded to the studios' offers.[42]

The studios also offered long-term output revenue sharing to distributors servicing IVRs, but relatively few IVRs (and therefore few distributors) wanted deals containing the same guarantees and fees as those negotiated by large chains.[43]

The reasons for the IVRs' reluctance (and therefore the distributors' reluctance) were numerous. Revenue sharing requires sophisticated computer equipment to report rental transactions electronically to the studios; solid credit because payments are made over time, not COD; large amounts of inventory space to accommodate multiple copies of every movie released by each studio; and increased capital because successful revenue sharing requires increased rental transaction volume, which requires additional advertising and other spending.[44] Due in part to these requirements, Blockbuster's cost-of-goods using output revenue-sharing increased by 33% over its pre-revenue sharing costs (from 30% to over 40%).[45]

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[39] *See* 31RT1148-52; DX-8031.

[40] *See* 30RT821, 864-67; 31RT957-58, 1148-52.

[41] *See* 30RT666; 32RT1651; 33RT1806, 1857-58; 34RT2220-21; 36RT2627, 2661-62.

[42] *See* 30RT670; 33RT1879-81; 36RT2677-78.

[43] *See* 31RT957-58, 1099-1104, 1148-52, 1125-26; 32RT1306-07, 1555; 34RT2157-58; 36RT2796-97, 2800.

[44] *See* 34RT2070-72; 31RT1176; 32RT1556-57; 34RT2025; 29RT329-30, 391-92; 37RT3183-84.

[45] *See* 37RT3041.

All of this evidence demonstrated that distributors and IVRs were largely unwilling to accept Blockbuster's revenue-sharing terms, fully justifying as independent, legitimate business conduct those instances where a studio failed to enter into a Blockbuster-style revenue-sharing agreement with petitioners' distributors.

2. Petitioners' so-called "controverting" evidence

Petitioners claim that they presented evidence that the two largest video distributors "actively sought the same terms made available to Blockbuster," which, according to petitioners, contradicts the evidence that the studios' conduct was justified by independent legitimate business reasons.[46] This evidence, however, not only fails to contradict the evidence of business justification, it actually confirms that distributors and IVRs were unwilling to accept Blockbuster's revenue-sharing terms. Thus, petitioners did not present evidence tending to exclude the possibility that respondents acted independently.

Petitioners focus primarily on letters David Ingram sent to studios complaining about the studios' direct relationships with large chains and the effect those agreements were having on Ingram and his customers, and expressing Ingram's interest in

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[46] Plaintiffs repeatedly use the word "direct" in describing the evidence they claim contradicted respondents' business justifications. For example, they claim that "the plaintiffs specifically controverted this contention by *direct* evidence that distributors and independent retailers requested and could do Blockbuster-comparable output revenue sharing." Pet. at 10 (emphasis in original). Whatever petitioners hope to accomplish by emphasizing the term "direct," it does not change the fact that they offered only ***circumstantial*** proof of conspiracy, as petitioners themselves acknowledge. Evidence that distributors asked for Blockbuster's revenue-sharing deals, even if true, is obviously not direct evidence that respondents conspired not to give them those deals. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) ("Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.").

securing terms that would enable independents to compete better. Petitioners portray these letters as "repeated requests" for output terms that were ignored by the studios.[47]

On their face, these letters do not contain a request for revenue-sharing deals at all. Instead, they merely reflect Ingram's displeasure with Blockbuster-style revenue-sharing deals and the impact they were having on his company and his customers. Moreover, petitioners fail to point out that they examined Ingram for hours, and never asked him the crucial question: "Did any studio refuse to negotiate output revenue sharing with you?" Defendants did ask Ingram whether he had any evidence that the studios conspired to deny distributors (including Ingram) output revenue sharing. Ingram unequivocally said he did not, and doubted that such a conspiracy could or would take place.[48]

Moreover, Ingram did negotiate revenue-sharing deals with some of the studios. Warner, for example, chose Ingram to be its exclusive distributor for output revenue sharing on terms identical to the Warner-Blockbuster agreement.[49] Far from being conspired against, Ingram testified that he was "encouraged by the studios to offer revenue sharing to [Ingram's] customer base."[50] The problem was that revenue sharing proved to be too burdensome for Ingram and his customers. It took Ingram over $1 million and two-and-a-

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[47] The district court held that all the Ingram documents (PX-65, 388, 374-76) were inadmissible as hearsay and could not support petitioners' conspiracy theory. *See* 30RT876-80; 31RT1095-97; 33RT1905-06, 1911-15; 34RT2005-07. Petitioners did not appeal these rulings and therefore are not entitled to rely on this evidence. Nevertheless, even if admissible, these documents do not tend to exclude the possibility of independent conduct by the studios.

[48] *See* 34RT2053-55.

[49] *See* 34RT2021; DX-379.

[50] *See* 33RT1959.

half years (to mid-2000) to set up 1000 stores (out of more than 20,000) to do revenue sharing.[51]

The Rentrak-Fox letters likewise do not "tend to exclude" independent conduct. Rather, this correspondence, beginning in August 1998, was part of the Fox-Rentrak negotiation of an output revenue-sharing agreement, which was completed during a length of time comparable to that for the Blockbuster-Fox agreement.[52] Aside from proving that Fox was willing to, and did, enter into output revenue sharing with Rentrak, these letters illustrate nothing about any other studio's dealings with Rentrak. For example, MGM also entered an output agreement with Rentrak, and did so on terms more favorable than the MGM-Blockbuster terms.[53]

3. The Fifth Circuit's decision

After reviewing all of the evidence in the record, including the Ingram and Rentrak evidence, the Fifth Circuit concluded that petitioners failed to present evidence that tended to exclude the possibility that respondents acted independently.[54] In other words, the court of appeals decided, after reviewing the record, that petitioners had presented insufficient evidence to create a ***reasonable*** inference of conspiracy. Considering what petitioners' "controverting" evidence actually says (as opposed to their spin on it), the district court and the court of appeals

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[51] *See* 34RT2060, 2069-70, 2072.

[52] *See* DX-4039; DX-4058, DX-4081; 35RT2573-74; 36RT2662-63.

[53] *See* 37RT3005, 3043-45.

[54] As petitioners point out, it must be assumed that the court of appeals reviewed all of the evidence in the record, as it is required to do in reviewing a judgment as a matter of law. *See* Pet. at 14. The fact that the Fifth Circuit did not specifically discuss each piece of evidence proves nothing. *See In re Baby Food Antitrust Litig.*, 166 F.3d at 131 ("The District Court may not have specifically addressed this testimony but that does not mean the court ignored it.").

could have reached no other result, because the Ingram and Rentrak evidence is entirely consistent with, not contradictory to, the wealth of additional evidence, including the studios' testimony, that each studio acted according to its own independent business judgments.

The Fifth Circuit's decision is in accord with this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Petitioners erroneously claim that *Eastman Kodak* establishes a "rule" that evidence of business justification creates a factual question for the jury to evaluate. Pet. at 3. The passage on which petitioners rely merely held that factual questions existed ***in that case*** about the validity of the defendant's claimed business justifications. *See* 504 U.S. at 483. As the Court explained at length, because Kodak's business justifications were inconsistent with its own theories and its own conduct, none of them was "sufficient" to prove that Kodak was entitled to summary judgment.[55] 504 U.S. at 485-86. Thus, the Court did not hold that business justifications always create a fact issue on conspiracy—it merely held that the business justifications at issue in the case before it did so.

The Fifth Circuit's decision is also entirely consistent with this Court's JMOL standard in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Petitioners claim that the Fifth Circuit violated *Reeves* by treating evidence of business justification as "dispositive" and ignoring evidence of alleged "pretext." Pet. at 14-15. *Reeves* was an employment discrimination case involving the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

[55] Unlike this case, the record in *Eastman Kodak* was severely underdeveloped because Kodak filed its motion for summary judgment before any discovery had taken place, and the district court granted the motion without a hearing after allowing the plaintiffs only one set of interrogatories, one set of requests for production of documents, and six depositions. 504 U.S. at 459. As the Court noted, Kodak's arguments might have turned out to be correct, but the Court was unable to reach that conclusion on "a record this sparse." *Id.* at 486.

(1973), and therefore did not implicate the limits on permissible inferences that *Matsushita* applies to antitrust conspiracy cases. Moreover, as the Court recognized in *Reeves*, evidence of pretext will not always be adequate to defeat judgment as a matter of law:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 530 U.S. at 148. Here, consistent with *Reeves*, the Fifth Circuit reviewed all of the evidence in the record and reached the unremarkable conclusion that petitioners' so-called "pretext" evidence was inadequate to defeat judgment as a matter of law.

The court of appeals did not have to create a "new standard" to reach this result because *Matsushita* compels it.[56] Petitioners

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[56] If the Fifth Circuit intended to create a "new standard" of giving "dispositive" weight to evidence of business justification, as petitioners imagine, Pet. at 24-25, one would have expected the court to at least hint that it was doing so. But the word "dispositive" does not appear in the Fifth Circuit's opinion. Nor does the opinion even remotely suggest that the court of appeals viewed its decision as expanding or departing from *Matsushita*. To the contrary, the Fifth Circuit articulated the correct standard from *Matsushita* and then relied on that standard in assessing the evidence in this case.

Tellingly, the Fifth Circuit determined that its opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. According to 5TH CIR. R. 47.5.1, an opinion

(Cont'd)

simply disagree with the Fifth Circuit's view of the evidence and have therefore set up the strawman of a "new restrictive legal standard" in an effort to have this Court arbitrate that disagreement.

II. There Is No Conflict Among The Circuits Regarding Summary Adjudication Of Antitrust Conspiracy Claims Based On Circumstantial Evidence.

Relying on their erroneous characterization of the Fifth Circuit's decision as giving "dispositive" weight to evidence of business justification, petitioners assert that the Fifth Circuit's decision conflicts with decisions of the Third, Sixth, Eleventh, and Seventh Circuits. According to petitioners, these circuits hold that evidence of business justification "is just another piece of evidence for the jury to consider." Pet. at 22.[57] Petitioners in effect argue that evidence of business justification can never defeat a plaintiff's prima facie case of conscious parallelism and "plus factors" at the summary judgment or judgment as a matter of law stage.

None of the cases petitioners cite supports their argument, and numerous other cases from these circuits demonstrate that there is no conflict among the circuits on the standard for summary adjudication of antitrust conspiracy claims. All of the

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(Cont'd)
should not be published if it "merely decide[s] [a] particular case[] on the basis of well-settled principles of law," but it should be published if it:

> [e]stablishes a new rule of law, alters, or modifies an existing rule of law . . . ; [a]pplies an established rule of law to facts significantly different from those in previous published opinions applying the rule; . . . [or] [c]reates or resolves a conflict of authority either within the circuit or between this circuit and another.

[57] Petitioners erroneously claim that *Eastman Kodak* supports this rule. *See supra* note 55 and accompanying text.

courts of appeals apply the same standard—the *Matsushita* standard—but, as one would expect, the courts reach different results when the standard is applied to the particular facts of each case. We address each of the allegedly conflicting circuits in turn.

Third Circuit. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), does not hold that evidence of business justification always creates a factual issue for the jury to decide. Rather, the Third Circuit held that defendants' proferred business justification "[made] no sense" and was therefore insufficient to rebut plaintiffs' evidence of conscious parallelism and acts against interest. *Id.* at 1244-45. Moreover, the Third Circuit held that it would permit "more liberal inferences from the evidence" than *Matsushita* allowed because the challenged conduct was not procompetitive. *Id.* at 1232. Petitioners have not suggested that more liberal inferences should be allowed in this case.

Consistent with the Fifth Circuit's decision in this case, the Third Circuit has affirmed summary judgment in cases where defendants presented evidence of business justification and plaintiffs failed to produce evidence tending to exclude the possibility of independent conduct raised by defendants' explanations. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 138 (3d Cir. 1999) (affirming summary judgment where defendants produced "evidence that [they] engaged in unilateral, aggressive competition," and plaintiffs failed to produce "sufficient circumstantial evidence to prove concerted collusion that tends to exclude the possibility of independent action"); *see also InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144 (3d Cir. 2003) (affirming summary judgment for defendant where plaintiff's attempt to rebut evidence that defendant acted unilaterally was "unavailing").

Sixth Circuit. *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), likewise fails to support petitioners' position. In that case, the Sixth Circuit rejected the

defendant's business justifications "as a matter of logic and law . . . because no reasonable jury could believe them." *Id.* at 1015-16. Obviously, without any credible evidence of business justification to rebut the plaintiff's "circumstantial evidence that [the challenged conduct] would not have been in either defendant's *independent* economic interest . . . [and] other circumstantial evidence of conspiratorial conduct," the defendant was not entitled to summary judgment. *Id.* at 1009 (emphasis in original).

Seventh Circuit. Petitioners cite *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997), to support their assertion that evidence of business justification simply creates a fact issue for the jury, but, as the passage petitioners quote explains, the Seventh Circuit was not addressing in that case ambiguous circumstantial evidence rebutted by evidence of business justification. It was dealing with "smoking gun" evidence consisting of "a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system." *Id.* at 614. The Seventh Circuit understandably held that defendants' "innocent interpretations" of this "smoking gun" evidence were not enough to sustain a summary judgment in their favor. Of course, as the Fifth Circuit recognized and petitioners do not dispute, there is nothing remotely resembling a "smoking gun" in this case and the record contains positive evidence of business justifications for respondents' conduct, not merely "innocent interpretations" of petitioners' evidence. *In re Brand Name* is simply inapposite.

Furthermore, other cases from the Seventh Circuit are entirely consistent with the Fifth Circuit's approach in this case. In fact, the Seventh Circuit follows a burden-shifting interpretation of *Matsushita* that ***requires*** summary judgment to be granted for defendants if they provide evidence of business justification and the plaintiff fails to present evidence that "tends

to exclude the possibility that defendants were pursuing their legitimate independent interests." *See Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir. 1992) (affirming summary judgment where defendants presented evidence of business justification and plaintiffs failed to produce evidence that tended to exclude the possibility of independent conduct); *see also Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995); *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990).

Eleventh Circuit. Finally, the Eleventh Circuit's decisions confirm that the Fifth Circuit correctly decided this case. Petitioners cite *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548 (11th Cir. 1998), and disingenuously quote the Eleventh Circuit's holding that evidence of conscious parallelism plus acts against self-interest were sufficient to defeat summary judgment. Petitioners neglect to mention that defendants apparently presented ***no*** evidence of business justification in that case. *See* 158 F.3d at 568. Like *In re Brand Name*, *City of Tuscaloosa* is therefore irrelevant to the question petitioners present for review in this Court.

Astonishingly, petitioners also cite *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003), to support their contention that "most circuits" treat "evidence of business justification or other innocent explanation [as] just another piece of evidence for the jury to consider." Pet. at 22. In fact, the Eleventh Circuit rejected nearly all of the arguments petitioners make here and affirmed summary judgment for defendants based on the evidence of business justification.

In *Williamson*, cigarette wholesalers alleged that tobacco companies conspired to fix cigarette prices. The wholesalers offered evidence of parallel pricing behavior and evidence of various "plus factors." Noting that consciously parallel conduct coupled with plus factors could create an inference of conspiracy, the Eleventh Circuit held that "defendants may rebut the inference of collusion by presenting evidence establishing that

no reasonable factfinder could conclude that they entered into a price fixing conspiracy." 346 F.3d at 1301 (citations omitted). Based on this standard, the Eleventh Circuit affirmed summary judgment for the defendants, holding that "even had appellants demonstrated the existence of one or more plus factors . . . the manufacturers would have readily rebutted the resulting inference of collusion." *See id.* at 1321.

In reaching its decision, the Eleventh Circuit rejected the very arguments that petitioners assert here—namely, that "the district court required it to exclude all 'innocent' explanations for appellees' conduct in order to survive summary judgment;" that "the district court's imposition of a 'tends to exclude the possibility that the alleged conspirators acted independently' standard contradicted *Eastman Kodak* because it imposed a 'special burden' on antitrust plaintiffs;" and "that the district court improperly substituted its assessment of the evidence for that of the jury." *Williamson*, 346 F.3d at 1302, 1304. In rejecting these arguments, the Eleventh Circuit defended the lower court's decision with language that applies equally well to the Fifth Circuit's decision in this case:

> [The court] merely ascertained, as it was required to do under *Matsushita* and *Harcros*, whether appellants' evidence tended to exclude the possibility of independent action. It made no finding as to whether such independent action did or did not exist. ***Although it did make determinations as to the reasonableness of the inferences that could be drawn from the evidence, these were threshold legal determinations that appropriately were made by the district court.***

Id. at 1304 (emphasis added). As this passage makes clear, the Eleventh Circuit's decision in *Williamson* could not be more consistent with the Fifth Circuit's decision in this case. *See also Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991).

The circuit conflict petitioners imagine simply does not exist.

CONCLUSION

The petition for writ of certiorari should be denied. In affirming judgment as a matter of law for respondents, the Fifth Circuit applied this Court's well-settled standard for summary adjudication of antitrust conspiracy claims based on circumstantial evidence. The Fifth Circuit did not decide any unsettled issue of law, did not create any new legal standard, and did not issue an opinion that conflicts with a decision of any other court of appeals.

Respectfully submitted,

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January 29, 2004

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No. 03-917

In The Supreme Court of the United States

RONALD CLEVELAND, doing business as Lone Star Videotronics; PHOENIX-MERCHANT INVESTMENTS INC., doing business as 49er Video; THE BIG PICTURE VIDEO INC.,

Petitioners,

v.

VIACOM INC.; PARAMOUNT HOME VIDEO, INC.; BUENA VISTA HOME ENTERTAINMENT, INC.; COLUMBIA TRI-STAR HOME VIDEO, INC.; UNIVERSAL STUDIOS HOME VIDEO, INC.; TWENTIETH CENTURY FOX HOME ENTERTAINMENT, INC.; BLOCKBUSTER INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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LIST PURSUANT TO RULE 29.6

The caption of this case contains the names of all the parties to the proceedings in the Fifth Circuit Court of Appeals. Pursuant to Rule 29.6, petitioners state as follows: Neither corporate petitioner Phoenix-Merchant Investments Inc. nor corporate petitioner The Big Picture Video Inc. is the subsidiary of any parent corporation. Further, no publicly held company owns 10% or more of either corporation's stock.

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REASONS FOR GRANTING THE PETITION

In an economy that champions competition, price fixing cannot be tolerated because it undermines the free enterprise system. Indeed, price fixing has been condemned since the Roman Empire,[1] because as Adam Smith, the father of capitalism, observed in 1776: "People of the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public and in some contrivance to raise prices."[2] Section 1 of the Sherman Act demands the same intolerance today of price fixing conduct.

I. Conspiracy To Fix Prices.

The fundamental proof of conspiracy in this case is:

- It is undisputed that Blockbuster had motive and opportunity to instigate the conspiracy – it was being outcompeted by the independent retailers, and thereafter Blockbuster met with each studio and discussed pricing (Pet. at 4-5);
- It is undisputed that as a result of those meetings Blockbuster got the new favored pricing terms it wanted, and it is uncontested that the plaintiffs' distributors did not (Pet. at 5, App. 51-53);
- It is admitted that the studios' conduct was consciously parallel (Opp. at 14, n. 33) – each studio agreed to the Blockbuster terms with Blockbuster but did not agree to such terms with plaintiffs' distributors (Pet. at 9-10);

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[1] Article 59(2) of the Constitution of Emperor Zeno of 483 A.D. prohibited price fixing in relation to clothes, fishes, sea-urchins and other goods, the sanction for violation being perpetual exile. *See* Codex Justinianus, Book 4, Title 59, § 2, p. 186 (Weidmann, 1954).

[2] Adam Smith, An Inquiry Into the Nature and Cause of the Wealth of Nations 55 (Great Books ed. 1952) (1776), cited in *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002).

- It is admitted that entering agreements on Blockbuster terms with plaintiffs' distributors would have been in the best individual economic interests of the studios – in fact, the studios each say they attempted to do so but the distributors would not agree (Pet. at 9-10); and
- Direct evidence from the distributors contradicted the defendants' assertion – the two largest distributors both repeatedly requested the Blockbuster terms. (Pet. at 10-11, n. 13)

There is nothing ambiguous about any of this evidence – by any measure it meets the requirements of presenting a fact issue as to conspiracy under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Defendants' Brief in Opposition (respondents here) is primarily a suggestion as to how facts in the record might be viewed differently from plaintiffs' construction (Opp. at 3-9, 12-22), but defendants do not, and cannot, refute the fundamental evidence of conspiracy. Defendants' "spin" of the facts is irrelevant at summary adjudication; thus, these facts, construed in plaintiffs' (petitioners here) favor, are all that is needed to defeat JMOL. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 151 (2000).

Defendants' price fixing scheme was not new – it was essentially the same scheme used by J.D. Rockefeller in the 1870s to monopolize the oil industry by fixing prices so that competitors' costs were too high to stay in business.[3] Here, Blockbuster induced the studios to maintain higher videotape acquisition costs for the independent retailers' distributors, thereby driving many independent retailers out of business and allowing Blockbuster to capture their market share. The studios' admissions showed that the

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[3] *See* Elizabeth Granitz and Benjamin Klein, "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case," 39 J. Law & Econ. 1 (1996), cited in *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778 (7th Cir. 1999) (Posner, J.).

scheme worked – Blockbuster dramatically increased its market share at the expense of thousands of independent retailers who went out of business because they were denied the favored acquisition terms. (Pet. at 6, App. 53-55, 75-80) This is blatant price fixing at its worst: a conspiracy that amounts to "interference with the setting of price by free market forces is unlawful per se." *United States v. Container Corp. of America,* 393 U.S. 333, 337 (1969); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940).

A. The Legal Issue is Properly Framed.

Respondents pose the issue by describing the court of appeals analysis: "[t]he Fifth Circuit *reviewed all the evidence* in the record and reached the *unremarkable conclusion* that petitioner's so-called pretext evidence was inadequate to defeat judgment as a matter of law." (Opp. at 21, emphasis added) But that is *not* an "unremarkable conclusion" in the face of the direct evidence refuting the proffered business justification. In that context – accepting as we must that the court did consider all the evidence – the result can only be a new legal standard, one in which evidence of a business justification for consciously parallel conduct against self-interest, even if contradicted, trumps evidence that is universally held as a matter of law to permit inference of conspiracy. This is precisely the legal issue posed by petitioners. (Pet. at 24-25)

B. *Matsushita* did not change the Federal Rules.

Respondents' recitation of what *Matsushita* means and how courts are to apply it would encroach on the Federal Rules of Civil Procedure governing summary adjudication. Certainly, *Matsushita* did not do that: it does not impose a special burden on plaintiffs responding to JMOL or summary judgment in antitrust cases, but "demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision."

Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 468 (1992). Rather, the focus of *Matsushita* is on the court's role to filter the permissible inferences that may be drawn from ambiguous circumstantial evidence to prove conspiracy in an antitrust case.

Here the fundamental inference to be considered is whether parallel conduct which is against individual economic self-interest permits an inference of conspiracy. All courts that have considered such conduct in an antitrust setting agree that it does. (Pet. at 9) Thus, the only question is whether there is evidence of such conduct in this record – and indeed there is, comprised of admissions and direct controverting evidence of third parties as set forth above.

The specific conduct complained of in this case is that the studios gave Blockbuster favored videotape acquisition terms that they denied to plaintiffs – clearly anticompetitive behavior.[4] The matter of law for the court is whether that conduct allows inference of conspiracy.[5] Parallel conduct against individual economic self-interest has arisen sufficiently in antitrust litigation that there is no doubt that collusion is a proper inference from such conduct. (Pet. at 9) The question of fact for the jury is

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[4] While revenue sharing in theory could be pro-competitive and lawful, it is illegal to conspire to deny those acquisition terms to a certain segment of the retail market (the independents' distributors) and thus force customers to limit their choices of retailers from whom they can rent videotapes. This is precisely the kind of conduct this Court has said "is not to be tolerated." *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

[5] The court's role under *Matsushita* is analogous to a court's role in a contract case to interpret the contract. E. Farnsworth, Contracts § 7.14, at 516 (1982) (citing *Brown & Co. v. M'Gran*, 39 U.S. (14 Pet.) 479, 493 (1840) (Story, J.) (It is "certainly true, as a general rule that the interpretation of written instruments properly belongs to the court and not to the jury.")). Likewise, in a patent case it is the court's role to "construe the claims." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

whether the conspiracy actually occurred – here defendants admit the accused conduct resulted in plaintiffs not getting the same deals as Blockbuster, but they offer an innocent business justification as to why it occurred. Because the proffered business justifications are controverted by the direct evidence of third parties, JMOL could not be granted unless a new rule of law is implemented. That is precisely what the Fifth Circuit imposed: it is now not enough that the plaintiff controvert defendants' business justification evidence, it must completely disprove all evidence of business justification to avoid JMOL. This is contrary to *Matsushita* and *Reeves,* as well as the Federal Rules of Civil Procedure.

C. There Is Confusion About *Matsushita* and the Fifth Circuit Is in Conflict.

Although *Matsushita* is considered the standard for determining summary adjudication in price fixing conspiracy cases, numerous courts, commentators, and practitioners find the proper application of *Matsushita* to be the source of widespread confusion in antitrust law.[6] Despite the Court's intention in *Matsushita* to clarify, rather than enlarge, the rule announced in *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752 (1984), the four dissenting

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[6] *See, e.g., Merck-Medco Managed Care, L.L.C. v. Rite-Aid Corp.*, 201 F.3d 436, 1999 WL 691840 at *5 (4th Cir. 1999) ("The standards for summary judgment and the limits on inferences in antitrust lawsuits are often quoted but not universally agreed upon."); Richard A. Posner, Antitrust Law, 2d ed. 2001, at 99-100 (calling the "tends to exclude the possibility of independent action" requirement adopted by *Matsushita* "unfortunate dictum" that "handicap[s]" the "development of this area of the law."); Areeda & Hovenkamp, *cited in* Pet. at 21 n.17 (cautioning against being misled by the "tends to exclude" language); Daniel R. Shulman, *Proof of Conspiracy in Antitrust Cases & the Oligopoly Problem*, 4 Sedona Conf. L. J. 1, 15 (2003) ("The law now . . . is a mess. Courts cannot agree on what the relevant plus factors are, and their relative weights.").

justices thought it "only muddies the waters."[7] When applying *Matsushita*, some courts of appeals have even derived further tests to simplify or systematize the analysis,[8] while others have hewn closely to each step of *Matsushita's* reasoning, including its emphasis on the plausibility of the economic theory.[9] Within this patchwork of approaches, the point of acute and outcome-determinative confusion that is raised by this case is the proper treatment of defendants' innocent explanations or business justifications for parallel conduct that would otherwise indicate collusion. Few defendants are without such explanations, and the evidentiary burden that courts place on plaintiffs to rebut them – mere scintilla, plausibility, preponderance, clear and convincing, overwhelming – should at least approach uniformity among the circuits.

The Fifth Circuit's approach establishes a regime in which direct evidence contradicting a business justification is not sufficient to create an issue of fact. This started in *Viazis v. Amer. Ass'n of Orthodontists,* 314 F.3d 758 (5th Cir. 2002), was extended here (Pet. at 23-25), and constitutes a severe departure from general summary adjudication standards,[10] from *Matsushita*, and from other circuits.

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[7] *Matsushita*, 475 U.S. at 599 (White, J., dissenting) ("The Court's opinion today . . . only muddies the waters . . . mak[ing] confusing and inconsistent statements about the appropriate standard for granting summary judgment.").

[8] *See, e.g., Williamson Oil Co., Inc. v. Phillip Morris USA,* 346 F.3d 1287, 1301 (11th Cir. 2003) (describing three-step analysis); *In re Citric Acid Litigation*, 191 F.3d 1090, 1094 (9th Cir. 1999) (setting out two-part burden-shifting test when plaintiffs rely on circumstantial evidence).

[9] *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224 (3d Cir. 1993); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.2d 651 (7th Cir. 2002).

[10] Plaintiffs seek only to bring the Fifth Circuit back within the basic standards for evaluating evidence in all cases. *Cf. Reeves*, 530 U.S. 133, 154 (Ginsburg, J., concurring) ("Under [the] common sense principle [that the jury is entitled to treat a party's dishonesty about a

(Continued on following page)

Petitioners' position is that the courts should not foist on plaintiffs an evidentiary burden so great that evidence of business justification *that is controverted* defeats a plaintiff's prima facie conspiracy case of consciously parallel conduct against economic interest. Should this Court grant the petition, the issue before it would be what burden defendants must bear with their evidence of business justification; or the other side of the same coin, what burden plaintiffs must bear in sufficiently rebutting business justifications to survive summary adjudication.[11]

According to respondents, *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548 (11th Cir. 1999), *Petruzzi's*, 998 F.2d 1224, and *RE/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), stand for the unremarkable proposition that business justifications that are nonexistent, nonsensical, or logically incredible are not sufficient for defendants to prevail on summary judgment. (Opp. at 23-25) Similarly, respondents characterize *In re Brand Name Prescription Drug Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997) as holding that "smoking gun" evidence of conspiracy defeats summary judgment regardless of innocent interpretations of conduct. Thus, defendants appear to support the Fifth Circuit's approach that any business justification that is better than nonsensical, and any evidence of conspiracy that is less than a "smoking gun," mandates summary adjudication, even where the business justification is

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material fact as evidence of culpability], evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for it gives rise to a rational inference that the defendant could be masking its actual, illegal motivation.").

[11] Because the issue presented by this petition concerns the proper evidentiary standard, the Court's opinion might involve examination of some portion of the evidence in this case. This does not, however, counsel against the granting of the petition, as most decisions of this Court addressing evidentiary burdens or adjudication standards and especially in this area *e.g.*, *Matsushita*, 475 U.S. at 577, have required such evaluation.

directly controverted. This position is so extreme as to constitute a split among the circuits.

Between the evidentiary extremes that respondents posit lie most price fixing cases and lies the Fifth Circuit's departure. To explain the Fifth Circuit's result, respondents recite the mantra that plaintiffs' evidence did not "tend to exclude" independent conduct. But this is a non-sequitur that conflates different levels of analysis – "tends to exclude" answers nothing where the question is what evidentiary burden is required to rebut a business justification.

D. Respondents' Deceptions

Respondents misrepresent important facts, including for example:

Opp. at 9, n. 27: Contrary to respondents' assertion, Petitioners are *not* parties to the action in California state court. (Pet. at 6, n. 5)

Opp. at 6, 16: It is inaccurate to state that the Blockbuster deals were "expensive and risky commitments" requiring "increased capital," "additional advertising" and increased "cost-of-goods." In truth, Blockbuster committed to spend with each studio only the amount of money it had historically, but got significantly more videotapes of the best movies, and both Blockbuster and the studios shared in the substantially increased profits. (Pet. at App. 53-55)

Opp. at 15: Contrary to respondents' statements, the largest distributor, David Ingram, repeatedly testified that he and the independent retailers wanted and requested revenue sharing deals on the same terms that Blockbuster got (34 RT 1959, 1966, 1970, 1972-73). This is strong testimony from a man who knew this testimony was adverse to the studios' wishes and admitted he was beholden to the studios for his economic well-being: "I do not have a company if the studios don't wish me to exist, so I do what the studios want us to do." (34 RT 1974)

Opp. at 15: It is misleading to assert that plaintiffs "never asked their distributors for output revenue sharing." The Blockbuster deals were confidential (34 RT 2041; 31 RT 1226), so plaintiffs did not know exactly what to call them, but their testimony is clear: Q: " . . . did you ask these studios to give you the same kind of deal that they were giving Blockbuster?" A: "Yes, I did." (30 RT 751) The major distributors testified that retailers asked for the same deal that Blockbuster had. (Pet. at App. 67-69) All three plaintiffs testified they wanted and could do output revenue sharing. (Pet. at App. 74)

Opp. at 5, 15-16: All the testimony about whether offers of revenue sharing were made or were rejected is self-serving testimony of high level studio executives that is irrelevant to consider for JMOL. *Reeves,* 530 U.S. at 151.

Opp. at 18, n. 47: While the court did not admit the Ingram letters to the studios into evidence, it did allow repeated testimony of the substance and import of the letters, including verbatim quotation from the letters that the Blockbuster deals had created an unfair advantage, that output deals had not been made available to independent retailers, that 615 dealers had been driven out of business in 90 days as a result, and that the playing field was not level. (34 RT 1984-86, 2011, 2015-16, 2018-20, 2023-24, 2026-30)

Opp. at 18-19: Contrary to respondents' assertion, neither Warner, MGM, nor any other studio ever offered plaintiffs' distributors output revenue sharing on terms "identical to" or "more favorable than" the Blockbuster deals. (Pet. at App. 51-53)

For respondents to assert that they have treated "petitioners' factual allegations in the light most favorable to them" (Opp. at 3, n. 2) is disingenuous at best.

II. Robinson-Patman Act – Price Discrimination.

The Fifth Circuit's reliance on *F.T.C. v. Borden*, 383 U.S. 637 (1966), in this case is misplaced. (Pet. at App. 9) The facts of that case had nothing to do with "like terms and conditions" as a prerequisite to Robinson-Patman Act liability, but rather the issue was whether differences in labeling of an identical product could justify price discrimination. This Court found that such differences, even if economically important to the consumer, did not provide cover for price discrimination, i.e., it was not a defense. *Id.* at 640. But the Fifth Circuit interprets that case to justify its conclusion that since Blockbuster and the independent retailers' distributors now purchase on different terms, Robinson-Patman liability could not attach. (Pet. at App. 8-9) This position is absurd. The products being purchased, videotapes of the same movies, were identical, and the terms and conditions under which Blockbuster and the independent retailers' distributors purchased were identical before the discrimination complained of in this case. If the Fifth Circuit is right, then this Court's decision in *Borden* overruled *F.T.C. v. Morton Salt,* 334 U.S. 37 (1948). There is no indication that this Court meant that to occur.

CONCLUSION

It is inadvisable to shackle the law meant to protect the public from price fixing with an evidentiary standard so high as to leave it ineffective. The Fifth Circuit has done so; the Petition for Certiorari should be granted.

Respectfully submitted this 9th day of February, 2004.

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